Exhibit A
[Proposed] Supplemental Brief

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

IN RE STATIC RANDOM ACCESS MEMORY (SRAM) ANTITRUST LITIGATION	Case No.: M:07-cv-1819 CW MDL No. 1819
This Document Relates To: All Indirect Purchaser Actions	**[PROPOSED] DEFENDANTS' SUPPLEMENTAL BRIEF REGARDING INACCURATE STATEMENTS AND NEW ISSUES RAISED AT THE HEARING ON CLASS CERTIFICATION** Judge: Hon. Claudia Wilken

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I. INTRODUCTION AND SUMMARY OF SUPPLEMENTAL BRIEF

It is black-letter law that class action claims for injunctive[1] and monetary relief, including restitution, require proof of actual injury under Article III by the class representatives, prior to certification being granted.[2] "If the named plaintiff fails to establish standing, he may not seek relief on behalf of himself or any other member of the class."[3] Moreover, for injunctive claims, prior to certification, the class representatives themselves must prove, with individualized proof, that they personally are threatened with real and immediate, non-speculative, future repeated harm from the alleged unlawful conduct.[4] Absent such proof, the Ninth Circuit mandates that the Court *sua sponte* dismiss the claim and deny class certification. (*Nelsen*, 895 F.2d at 1254–55 ("Because [Plaintiffs] did not possess the requisite standing to assert a claim of injunctive relief, the district court did not abuse its discretion in denying their motion for class certification and properly dismissed their equitable claim.").)

Yet, instead of attempting to satisfy their burden to establish standing, Plaintiffs claim that they "don't have to prove ***anything***," and that any proof that they might need regarding injury can wait until the claims process. (Hearing Tr. 32:22–34:6 (emphasis added).) Plaintiffs' assertion that injury issues can wait until the claims process not only ignores Article III's requirements, it also violates the black-letter rule that a class must be ascertainable at the time of certification. (*See* n.19.)

Plaintiffs would have this Court — under the guise of "do[ing] rough justice" (Hearing Tr. 16:17:21) — find that Plaintiffs don't need to prove any injury, past or present, for their monetary claims, and further that they don't need to prove a threat of real and immediate future harm to seek injunctive relief. But a showing of injury is required not only to establish standing under Article III (and thus the court's jurisdiction), but also to justify monetary or injunctive relief under Rule 23.

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[1] Plaintiffs' motion for class certification seeks injunctive relief under federal law ***only***, not under state laws. (Motion 2:8-11; Memo 1:15-19, 2:8-11.) At the hearing, Plaintiffs created the impression that they were only seeking restitution under California law, which would be tried to the Court. (Ex. 1 to this brief, 9/3/2009 Class Cert. Hearing Transcript ("Hearing Tr.") 10:3–23.) But Plaintiffs have alleged a Cartwright Act claim for damages, which would require a jury trial.

[2] *Nelsen v. King County*, 895 F.2d 1248, 1249-50 (9th Cir. 1990) (citing *LaDuke v. Nelson*, 762 F.2d 1318, 1322 (9th Cir. 1985)).

[3] *Cady v. Anthem Blue Cross Life and Health Ins. Co.*, 583 F. Supp. 2d 1102, 1106 (N.D. Cal. 2008) (internal quotation marks omitted) (quoting *Lee v. Oregon*, 107 F.3d 1382, 1390 (9th Cir. 1997) (quoting *Nelsen*, 895 F.2d at 1250)).

[4] *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983).

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The Court is therefore not at liberty to dish out "rough justice." Rather, the Court should dismiss Plaintiffs' claims with prejudice for lack of standing and deny class certification.

II. SUPPLEMENTAL AUTHORITY

A. Is the Court Required To Consider Plaintiffs' Article III Standing at This Stage of the Proceedings? Yes, it is Mandatory in the Ninth Circuit.

Plaintiffs seek to certify a nationwide class under Federal Rule of Civil Procedure 23(b)(2) for injunctive relief of those persons who "from November 1, 1996 through December 31, 2006, purchased SRAM in the United States indirectly from the Defendants . . .." Plaintiffs, however, lack standing to represent an equitable class of any kind, including one for injunctive relief, as they have not and cannot satisfy the requirement imposed by Article III of the Constitution that they show an actual case or controversy exists.[5]

As this Court recognized in *Cady v. Anthem Blue Cross Life and Health Ins. Co.*, 583 F. Supp. 2d 1102, 1106 (N.D. Cal. 2008), standing "is a jurisdictional element that must be satisfied prior to class certification."[6] "If the named plaintiff fails to establish standing, "he may not 'seek relief on behalf of himself or any other member of the class.'"[7] For "if there is no jurisdiction[,] there is no authority to sit in judgment of anything else."[8] This threshold requirement has been described as "inflexible and without exception."[9] (*Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998).) Thus, "[a]ny analysis of class certification ***must*** begin with the issue of standing." [10]

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[5] "In order to have standing in federal court, a party must satisfy the case or controversy requirement imposed by Article III of the Constitution." (*Slowiak v. Land O'Lakes, Inc*., 987 F.2d 1293, 1296 (7th Cir. 1993) (internal citations omitted).)

[6] *See also Nelsen*, 895 F.2d at 1249-50 (quoting *LaDuke v. Nelson*, 762 F.2d 1318, 1322 (9th Cir. 1985)); *Does I Through III v. District of Columbia*, 216 F.R.D. 5, 9 (D.D.C. 2003) (citing *Stevens v. Harper*, 213 F.R.D. 358, 366 (E.D. Cal. 2002)); *Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290, 294 (5th Cir. 2001) ("Standing is an inherent prerequisite to the class certification inquiry."); *Griffin v. Dugger*, 823 F.2d 1476, 1482 (11th Cir. 1987); *Doe v. Unocal Corp*., 67 F. Supp. 2d 1140, 1141-42 (C.D. Cal. 1999).

[7] *Cady*, 583 F. Supp. at 1106 (quoting *Lee v. Oregon*, 107 F.3d 1382, 1390 (9th Cir. 1997) (quoting *Nelsen*, 895 F.2d at 1250).

[8] *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 778 (2000).

[9] Notwithstanding this pronouncement, ***one*** limited exception to this rule was laid out in *Ortiz v. Fireboard Corp.*, 527 U.S. 815, 831 (1999). There, a unique factual record and procedural posture, involving a settlement class procedure under Rule 23.1 (requiring special notice by plaintiff to maintain a derivative action), made consideration of Rule 23 requirements "logically antecedent" to the standing question; thus, the court addressed class certification prior to standing. *See Unocal*, 67 F. Supp. 2d at 1141 (distinguishing *Ortiz*). "*Ortiz*, however, has been narrowly construed by the Ninth Circuit only to apply 'in the very specific situation of a mandatory global settlement class.'" (*Siemers v. Wells Fargo & Co.*, No. C 05-04518 WHA, 2006 WL 3041090, 5–6 (N.D. Cal. Oct. 24,

Further, as defense counsel alluded to during the recent hearing before this Court, since the question of standing is jurisdictional in nature, federal courts are not just at liberty to, but in fact are ***required*** to, examine the standing issue ***sua sponte***[11] even if the question has been "inadequately explored by the parties."[12] (*Does I Through III*, 216 F.R.D. at 9 (citing *Lewis v. Casey*, 518 U.S. 343, 349 n.1 (1996)); *United States v. Hays*, 515 U.S. 737, 742 (1995); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230–31 (1990); and *B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1264 (9th Cir. 1999) ("federal courts are required *sua sponte* to examine jurisdictional issues such as standing" (citing *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986))).)

Thus, it is black-letter law that the Court must address Plaintiffs' lack of evidence regarding injury at this stage of the proceedings.

B. Do Plaintiffs Satisfy Article III's Standing Requirements? No.

To establish standing under the actual case and controversy requirement of Article III, plaintiffs must prove certain distinct elements: First, a plaintiff must have suffered an "injury in fact" — an invasion of a legally protected interest which is (a) "concrete and particularized" and (b) "actual or imminent," not conjectural or hypothetical.[13] Second, there must be a ***causal connection*** between the injury and the conduct complained of — ***the injury has to be fairly traceable to the challenged action of the defendant***, and not the result of the independent action of

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2006) (quoting *Easter v. Am. W. Fin.*, 381 F.3d 948, 962 (9th Cir. 2004)); *see also In re Eaton Vance Corp. Sec. Litig.*, 220 F.R.D. 162, 165-66 (D. Mass 2004) (recognizing *Ortiz* as a limited exception based upon "extremely unique and complex problems" which "defie[d] customary judicial arbitration" (citations omitted)). Further, the class certification issues here are not "logically antecedent" to the standing question (actual or impending injury), which would exist regardless of whether the case was brought as a class action. *Doe v. Unocal*, 67 F. Supp. 2d 1140, 1142 (C.D. Cal. 1999) (addressing "standing concerns first because the Rule 23 requirements are not logically antecedent to the standing question"); *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 319, n.6 (5th Cir. 2002) (finding class certification issues not logically antecedent where "the standing question would exist whether [class representative] filed her claim alone or as part of a class; [and thus] class certification did not create the jurisdictional issue.")

[10] *Prado-Steiman v. Bush*, 221 F.3d 1266, 1280 (11th Cir. 2000) (emphasis added).

[11] Hearing Tr. 20:20–22:16.

[12] The Court's duty to examine the issue of standing *sua sponte* exists on an ongoing basis throughout all stages of the litigation. *Bashkin v. Hickman*, No. 07cv0995-LAB (CAB), 2008 WL 183696, at *7 (S.D. Cal. Jan. 17, 2008) ("[A] court has a continuing duty to examine its own jurisdiction to grant relief." (citation omitted)); *Brosnan v. Alki Mortgage, LLC*, No. C 07 4339 JL, 2008 WL 413732, at *1 (N.D. Cal. Feb. 13, 2008) ("Without standing, the court lacks subject matter jurisdiction."); Fed. R. Civ. P. 12(h)(3) ("If the court determines ***at any time*** that it lacks subject-matter jurisdiction, the court must dismiss the action." (emphasis added)).

[13] *Unocal*, 67 F. Supp. 2d at 1142 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

some third party not before the court.[14] Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[15]

And here, as Plaintiffs are seeking injunctive relief on behalf of themselves and the purported class, Plaintiffs must prove a fourth element: Plaintiffs must establish a "real and immediate threat of ***repeated*** injury" demonstrated by more than just "past exposure to illegal conduct."[16] "A federal court cannot ignore this [standing] requirement without overstepping its assigned role in our system of adjudicating only actual cases and controversies."[17]

Before turning to the class as a whole, the Court's jurisdictional inquiry must focus on the named plaintiffs themselves, for ***"[a] litigant must be a member of the class he or she seeks to represent at the time the class action is certified by the district court***."[18] Further, a putative class representative cannot bootstrap alleged class-wide injury as a basis to satisfy his own standing, because the fact "[t]hat a suit may be a class action . . . adds nothing to the question of standing, for even ***named plaintiffs*** who represent a class ***'must*** allege and ***show that they personally have been injured***, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'"[19] This is so, because "[p]laintiffs must demonstrate a 'personal stake in the outcome' in order to 'assure that concrete adverseness which sharpens the presentation of issues . . . .'"[20] Thus, "[u]nless the named plaintiffs are themselves entitled to seek injunctive relief, they may not represent a class seeking that relief." (*Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1045 (9th Cir. 1999) (en banc); *see Nelsen*, 895 F.2d at 1250 ("If the litigant fails to establish standing, he may not 'seek relief on behalf of himself or any other member of the class.'" (quoting *O'Shea*, 414 U.S. at 494)).)

In deciding whether a class representative has standing to seek certification of an injunctive class, the court "must" look beyond conclusory allegations and "***make an individualized inquiry***

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[14] *Id.*

[15] *Id.*

[16] *City of Los Angeles*, 461 U.S. at 102 (emphasis added) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974)).

[17] *Unocal*, 67 F. Supp. 2d at 1142 (C.D. Cal. 1999) (citing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 39 (1976)).

[18] *Nelsen*, 895 F.2d at 1250 (emphasis added) (citing *Sosna v. Iowa*, 419 U.S. 393, 403 (1975)).

[19] *Lewis v. Casey*, 518 U.S. 343, 357 (1996) (emphasis added) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. at 40, n.20.)

[20] *City of Los Angeles*, 461 U.S. at 101 (citing *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

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into whether there is a credible threat" of repeated harm to the named plaintiffs.[21] Indeed, the "question . . . is whether the practices to which the plaintiffs object are capable of repetition *as to them*."[22] Accordingly, Plaintiffs must demonstrate not only that they have been harmed in the past (as a result of Defendants' actions) but also that they, themselves, are "realistically threatened by a repetition of [the violation]."[23] Such risk of repeated harm must be "real and immediate."[24] As such, abstract, hypothetical, or "rough justice" theories of injury are not sufficient, because Plaintiffs must show that they have "sustained or are immediately in danger of sustaining some direct injury" as a result of the alleged conduct.[25]

As Defendants have already shown, the named Plaintiffs are unable to establish the necessary elements to prove standing in federal court. The class representatives cannot establish the first three elements of standing required for any type of case — "injury in fact" that is "fairly traceable" to the challenged actions of the defendants, which will be redressed by a favorable decision by the Court.[26] This is so, because Plaintiffs cannot establish ***any*** of the following matters, all of which are required to show causation and injury: that (1) they purchased products containing SRAM; (2) the SRAM contained within their purchased products was manufactured by Defendants; (3) the particular SRAM was subject to an overcharge to a direct purchaser; (4) the direct purchaser passed through the overcharge; and finally (5) the overcharge was passed through the entire distribution chain all the way down to the class representatives. Given these shortcomings, Plaintiffs do not have standing to pursue their damages and restitution claims, let alone a sweeping national injunctive claim.[27]

Neither can Plaintiffs establish the demanding fourth element of standing, required for injunctive claims. As recognized by the Ninth Circuit, there are even "tighter restrictions on claims

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[21] *Nelsen*, 895 F.2d at 1251-52 (emphasis added).
[22] *Sample v. Johnson*, 771 F.2d 1335, 1339 (9th Cir. 1995) (emphasis in original).
[23] *Does I Through III*, 216 F.R.D. at 10 (citing *City of Los Angeles*, 461 U.S. at 109).
[24] *D.C. Common Cause v. Dist. of Columbia*, 858 F.2d 1, 8 (D.C. Cir. 1988) (quoting *O'Shea*, 414 U.S. at 496).
[25] *City of Los Angeles*, 461 U.S. at 101-02 ("Abstract injury is not enough.").
[26] *Unocal*, 67 F. Supp. 2d at 1142.
[27] *Slowiak v. Land O'Lakes, Inc.*, 987 F.2d 1293, 1297 (7th Cir. 1993) (antitrust action for damages dismissed for lack of Article III standing where plaintiff "at most" could show only a "hypothetical or conjectural injury"); *City of Los Angeles*, 461 U.S. at 101 ("[T]hose who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy." (citations omitted)).

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of standing for injunctive claims predicated upon allegedly recurrent injuries."[28] "[No] matter how important the issue or how likely that a similar action will be brought, a court is without jurisdiction if there is not a sufficient likelihood of recurrence with respect to the party now before it."[29] The "burden of showing [this] likelihood of recurrence is firmly on the plaintiff."[30] And to meet their burden, plaintiffs must present credible facts, rather than conclusory allegations and inferences, showing that there is a "real and immediate," rather than a "conjectural" or "hypothetical," threat of future harm. (*In re Nifedipine Antitrust Litig.*, 335 F. Supp. 2d 6, 16, 18 (2004) (antitrust suit dismissed for lack of jurisdiction where plaintiffs alleged "without providing any factual basis, that the defendants have continued their allegedly unlawful conduct.").) There, as here, the defendants argued that there was nothing to enjoin, and that any future hypothetical injury was redressable by monetary damages and not injunctive relief.[31] The court agreed and found that plaintiffs lacked standing to seek injunctive relief, explaining "[t]he Court is not required to accept the plaintiffs' conclusions and inferences if they are unsupported by facts, and indeed, the plaintiffs have provided no factual basis for their claims that there is any kind of continuing violation on the part of the defendants."[32] And this concrete evidentiary showing must be made as to the named plaintiffs themselves, because "the requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)."[33] Thus, to establish standing, there must be an "***individualized showing***" of "a very significant possibility" ***that the alleged future harm will fall upon the class representatives themselves***.[34]

The facts here are analogous to *In re Nifedipine*. Plaintiffs argue that they have a right to seek injunctive relief on behalf of the proposed class because the alleged conspiracy may be ongoing

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[28] *Nelsen*, 895 F.2d at 1251.
[29] *Id.* (quoting *Sample*, 771 F.2d at 1342).
[30] *Id.*
[31] *Id.* at 16.
[32] *Id.* at 18; *see also City of Los Angeles*, 461 U.S. 95 at 101-02; *Nelsen*, 895 F.2d at 1250 ("The 'mere physical or theoretical possibility' of a challenged action again affecting the plaintiff is not sufficient.") (citing *Murphy v. Hunt*, 455 U.S. 478, 482 (1982)); *Id.* (plaintiffs must demonstrate a "credible threat" that they will again be the subject of the specific injury for which they seek injunctive relief) (citing *Kolender v. Lawson*, 461 U.S. 352, 355, n.3 (1983)); *Alber v. Ill. Dep't. of Mental Health and Dev. Disabilities*, 786 F. Supp. 1340, 1353-54 (N.D. Ill. 1992) ("Mere conjecture of future injury will not do the trick.").
[33] *Nelsen*, 895 F.2d at 1250 (internal quotation marks and citations omitted).
[34] *Id*. (emphasis added).

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or that, without court intervention, it may begin again. But Plaintiffs have no actual evidence to support this assertion. In fact, Plaintiffs' Third Amended Complaint does not specifically allege an ongoing conspiracy; rather, it alleges only that Defendants' alleged illegal activities continued through "at least" December 31, 2006. Moreover, Plaintiffs' own expert, Dr. Noll, testified that the conspiracy, if one existed, ended prior to 2006.[35] Thus, just like *In re Nifedipine*, there is no evidence of ongoing anti-competitive behavior and absolutely nothing to enjoin. Bereft of evidence to support their claim, Plaintiffs can only point the Court to the alleged past wrongs of Defendants. But the Supreme Court sounded the death knell on Plaintiffs' theory long ago, holding that past exposure to illegal conduct "is largely irrelevant when analyzing claims of standing for injunctive relief that are predicated upon threats of future harm."[36] "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects."[37] Plaintiffs' unsupported assertions, therefore, fall far short of meeting their burden and constitute no more than mere speculation about a hypothetical future injury.[38] Without proof of "real and immediate" "threatened conduct that will cause loss or damage" to the named plaintiffs, Plaintiffs lack standing, and the Court therefore lacks jurisdiction over their claims for injunctive relief.[39] Accordingly, under Ninth Circuit precedent, the Court must *sua sponte* dismiss Plaintiffs' injunctive relief claims for lack of standing and deny Plaintiffs' motion for an injunctive class. It really is that simple.

C. Are Plaintiffs Required To Show Injury for Certification of an Injunctive Class Under Rule 23(b)(2)? Yes.

At the hearing, Plaintiffs contended that they need only show that there was a conspiracy in order to obtain injunctive relief:

> Mr. Scarpulla: The nationwide equitable claims, if you — if we prove that the Defendants engaged in a horizontal conspiracy, the purpose and effect of

[35] Ex. RR, Noll Dep. 116:10-117:21 ("As I said in my report, it may well have ended when the DRAM conspiracy ended [2001]. Since it's some of the same people at the high levels of the company . . . Did it really end in 2005, or did it end in 2002?"); Ex. QQ, Noll Report ¶ 88.

[36] *Nelsen*, 895 F.2d at 1251.

[37] *City of Los Angeles*, 461 U.S. 95, 102 (citing *O'Shea*, 414 U.S. at 495-96).

[38] *Slowiak*, 987 F.2d at 1297 ("hypothetical or conjectural injury . . . does not confer standing"); *see also City of Los Angeles*, 461 U.S. at 101-02; *In re Nifedipine*, 335 F. Supp. 2d at 16.

[39] *In re Nifedipine*, 335 F. Supp. 2d at 19.

> which was to raise the prices of SRAM in the United States, that in and of itself is sufficient . . . .

(Hearing Tr. 12:12–12:23.)

Much like the standing requirement, plaintiffs must establish a "real and immediate" threat that they will again be subject to the complained-of wrong and suffer an irreparable injury as a result thereof to justify injunctive relief and certification under Rule 23(b)(2).[40] Failure to do so is fatal to any motion seeking class certification under Rule 23(b)(2). (*Easyriders*, 92 F.3d 1486; *Nelsen*, 895 F.2d at 1248 (affirming denial of class certification under Rule 23(b)(2) because representative plaintiffs failed to prove that they had been injured and that there was a real and immediate danger of repeated injury); *City of Los Angeles*, 461 U.S. 95 (holding that even if the complaint had presented an existing case or controversy, an adequate basis for equitable relief had not been demonstrated where future harm could not be shown); *see also In re New Motor Vehicles Can. Export Antitrust Litig.*, 522 F.3d at 6 (reversing the district court's certification of a nationwide injunctive class where there was ***no evidence of a threatened recurrence of the overcharge conspiracy and dismissing the claim for injunctive relief***.)

D. Can Plaintiffs Satisfy the Injury Requirement for Certification of an Injunctive Class Under Rule 23(b)(2)? No.

To justify injunctive relief, plaintiffs must demonstrate the "likelihood of substantial and immediate irreparable injury" and the inadequacy of a remedy at law.[41] Plaintiffs contend that there is a threat of ***potential*** price-fixing by the Defendants in the future, but fail to present any evidence that this purported future price-fixing will indeed occur, let alone any evidence that it will cause injury to *them*. Such speculation, without evidentiary support, is wholly insufficient to satisfy the

[40] *City of Los Angeles*, 461 U.S. at 110 ("The equitable remedy is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again . . . . "); *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1496 (9th Cir. 1996) ("Many of the considerations involved in determining the propriety of issuing an injunction often overlap with the considerations used in determining whether there is an Article III case or controversy.") (citations omitted); *In re New Motor Vehicles Can. Export Antitrust Litig.*, 522 F.3d at 13 (1st Cir. 2008) ("The requisite showing of a 'threatened injury' under Section 16 dovetails with Article III's requirement that in order to obtain forward-looking relief, a plaintiff must face a threat of injury that is both 'real and immediate,' not 'conjectural' or 'hypothetical.'") (citing *O'Shea*, 414 U.S. at 494).

[41] *Easyriders.*, 92 F.3d at 1495; *Hillside Dairy, Inc. v A.G. Kawamura*, 317 F. Supp. 2d 1194, 1196 (2004).

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requirements of Rule 23(b)(2). As such, even if Plaintiffs were able to "climb the cliff" erected by *City of Los Angeles* (*Alber*, 786 F. Supp. at 1353) and establish standing, they are simply unable to present facts sufficient to justify permanent injunctive relief under Rule 23(b)(2).

Moreover, Plaintiffs mischaracterize what they would have to prove at trial in the unlikely event that this Court finds that the individual class representatives have standing and also certifies a class. (Hearing Tr. 12:12–12:23 ("if we prove that the Defendants engaged in a horizontal conspiracy, the purpose and effect of which was to raise the prices of SRAM in the United States, that in and of itself is sufficient . . . .").) If the Court were to certify the class, the evidentiary focus regarding injury would simply shift from an analysis of the class representatives to an analysis of the class.[42] Thus, at trial, in order to issue an injunction in a Rule 23(b)(2) class action, the Court would need to find all of the following: (1) a conspiracy to fix prices is currently active; (2) a conspiracy will continue to be active in the future; and (3) the class is subject to a real and immediate threat of future injury from the conspiracy.[43]

Yet, Plaintiffs have presented no credible evidence that the alleged conspiracy continues and is likely to continue in the future. Indeed, Plaintiffs have not even attempted to do so. Nor have Plaintiffs even proposed a method by which they would be able to show at trial that the class "faces a credible threat of recurring injury." Thus, Plaintiffs have not and cannot justify injunctive relief under Rule 23(b)(2).

E. Are Plaintiffs Required To Show Injury for Certification of a Restitutionary Class Under Rule 23(b)(3)? Yes.

At the hearing on class certification, regarding state claims seeking restitution, Plaintiffs' counsel incorrectly represented that there would be no individualized issues with respect to pass-through in assessing restitution, and that all Plaintiffs need to do is figure out how much profit the Defendants made on SRAM, and that such profit would be disgorged:

[42] *LaDuke*, 762 F.2d at 1325–26.

[43] *See LaDuke*, 762 F.2d at 1326 (in addition to proving the substantive violation, at trial plaintiffs have the burden to prove "that the plaintiff class faces a credible threat of recurring injury").

> Statewide classes do not have the necessity to show pass-on. That is not an element. The only element is how much money did the defendants take that does not belong to them. It has nothing to do [sic] whether it was passed on.
>
> ***
>
> All you need is an accountant to go to each defendant's books, find out how much profit they made on SRAM sales in the United States, billed to, shipped to U.S., that's it. They have to give it back if they are guilty of fixing prices . . . [i]n California, they have to disgorge the entire sale price, so all you have to do is send an accountant over there and find out how much.

(Hearing Tr. 10:12-15, 32:22-34:6.)

Plaintiffs are gravely mistaken. The exclusive monetary remedy available to private plaintiffs under the California Unfair Competition Law ("UCL") (Cal. Bus. & Prof. Code §§ 17200, *et seq*.) is restitution.[44] Restitution is limited to the return of money or property in which a plaintiff has an ownership interest.[45] And the UCL "operates only to return to a person those measurable amounts which are wrongfully taken by means of an unfair business practice."[46]

Any recovery in this case would be limited to the return of any alleged overcharge paid by a Plaintiff indirectly to a Defendant. (*In re First Alliance Mortg. Co.*, 471 F.3d 977, 997 (9th Cir. 2006) (finding that plaintiffs could not recover all moneys obtained by defendants, where only a small percentage of the moneys received by defendants came as a result of the allegedly exorbitant fees; explaining that "there is no basis to conclude that every single dollar that ultimately flowed to Lehman was 'ill-gotten").) Contrary to Plaintiffs' contentions, disgorgement of neither non-restitutionary profits nor the entire sales price is available under the UCL.[47] This rule applies equally to individual cases and to class actions. As this Court explained in *Chamberlan v. Ford*

[44] Cal. Bus. & Prof. Code § 17203; *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1144 (2003); *Madrid v. Perot Sys. Corp.*, 130 Cal. App. 4th 440 (2005).

[45] *Korea Supply*, 29 Cal. 4th at 1146–47; *Madrid*, 130 Cal. App. 4th at 453, 455.

[46] *Day v. AT&T Corp.*, 63 Cal. App. 4th 325, 338–39 (1998).

[47] *Korea Supply*, 29 Cal. 4th at 1147 (rejecting plaintiffs' contention that the equitable powers afforded a court under the UCL were broad enough to encompass non-restitutionary disgorgement of profits); *Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F. 3d 991, 1009 (9th Cir. 2008) (rejecting argument that defendant's profits constitute property taken from plaintiff and affirming the judgment finding evidence insufficient to support restitution award).

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Motor Co., the *Korea Supply* holding precluding recovery of non-restitutionary disgorgement is not limited to "direct victims in representative actions."[48] Indeed, under *Korea Supply*, a class action plaintiff, even in the rare situation where a court orders disgorgement into a fluid recovery fund, "may recover money . . . only to the extent that the recovery is restitutionary."[49] Thus, Plaintiffs' claim that they can simply have an accountant look at Defendants' profits and ignore whether the Plaintiffs actually paid an overcharge is directly contrary to the holdings of the California Supreme Court and this Court.

Moreover, the class representatives lack standing to seek restitutionary or injunctive relief[50] because they have failed to show that they purchased products containing Defendants' SRAM that was subject to an alleged overcharge, which was passed through to them, and therefore, have failed to show that they have an ownership interest in the relief sought.[51] In their Complaint, Plaintiffs proposed identifying class members who purchased products containing Defendants' SRAM by

[48] No. C:03-2628 CW, 2003 WL 25751413, at *9 (N.D. Cal. Aug. 6, 2003); *see also Madrid*, 130 Cal. App. 4th at 461 (court rejected argument that restitution may be measured by defendant's gain rather than by plaintiff's loss); *Feitelberg v. Credit Suisse First Boston LLC*, 134 Cal. App. 4th 997, 1016 (2005) ("[T]he nonrestitutionary remedy that plaintiff seeks is not available under the UCL, regardless of whether the claim is prosecuted as a class action.").

[49] *Chamberlan*, 2003 WL 25751413, at *9; *Alch v. Sup. Ct.*, 122 Cal. App. 4th 339, 408 (2004) ("The question is not whether the trial court could order fluid class recovery of a damages award; it is whether the trial court has the authority to award non-restitutionary backpay under the UCL in the first instance. It does not."); *Madrid*, 130 Cal. App. 4th at 455 (holding that nonrestitutionary disgorgement into a fluid recovery fund is not an available remedy in a UCL class action); *Feitelberg*, 134 Cal. App. 4th 997, 1015 (2005) (a fluid recovery fund "does not enlarge the remedies available under the applicable substantive law").

[50] Until recently, there was a split among district courts within the Ninth Circuit regarding whether a plaintiff may have standing to seek injunctive relief under section 17200 even though the plaintiff had no claim for restitution under *Korea Supply*. (Compare *Walker v. USAA Cas. Ins. Co.*, 474 F. Supp. 2d 1168, 1172-74 (E.D. Cal. 2007) (holding that such a plaintiff does not have standing to pursue a claim for injunctive relief) with *G&C Auto Body v. GEICO Gen. Ins. Co.*, No. C06-04898 MJJ, 2007 WL 4350907, at *3–4 (N.D. Cal. Dec. 12, 2007) (declining to follow *Walker* and holding that such a plaintiff does have standing to pursue a claim for injunctive relief)). But in *Walker v. Geico Gen. Ins. Co.*, the Ninth Circuit held that the same standards that apply to restitutionary standing under the UCL apply to standing for injunctive relief. (558 F.3d 1025, 1027 (9th Cir. 2009) ("Because remedies for individuals under the UCL are restricted to injunctive relief and restitution, the import of the requirement is to limit standing to individuals who suffer losses of money or property that are eligible for restitution." (internal quotation marks omitted).) Thus, even if Plaintiffs had sought injunctive relief under the UCL, which they did not, they would lack standing to seek such relief for the same reasons they lack standing to seek restitution.

[51] *See Shersher v. Sup. Ct.*, 154 Cal. App. 4th 1491 (2007) (holding restitution under UCL available when indirect purchasers "had an ownership interest in the restitutionary relief sought because they purchased [the product at issue]," but distinguishing *Alch*, *Madrid*, and *Feitelberg* as cases in which restitutionary relief was unavailable because "plaintiffs never had any interest in the money they sought to recover").

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looking at identifying information on SRAM contained in class members' products.[52] But each and every class representative objected to Defendants' request to inspect their end-use products,[53] thereby precluding Defendants and the Court from determining whether any class representative can even begin to attempt to show they have standing to bring a UCL claim. Moreover, even if the class representatives could produce their products for inspection and show that the products do in fact contain SRAM manufactured by a Defendant, that would not establish standing. They would still need to show that the SRAM contained in their product was subject to an overcharge to a direct purchaser and that the overcharge was passed through the distribution chain to them.

Instead of attempting to satisfy their burden of proof of injury, Plaintiffs claim that they "don't have to prove ***anything***"[54] and that the evidentiary showing regarding whether their products contain Defendants' SRAM can wait until the end of the case during the claims process. Plaintiffs' contend that they need not make any evidentiary showing of causation and injury until the claims process, but this assertion does not comport with their burden of proof under the UCL. Nor is it consistent with black-letter law requiring the class to be ascertainable at the time of certification.[55] Indeed, courts recognize that it would be folly to certify an unascertainable class based on the hollow promise, such as Plaintiffs' here, that problems in identifying class members can be pushed off to the claims process: "The problems inherent in ascertaining and distributing a damage award to countless consumers will make it impossible to administer the action and thereby negate any advantages gained by allowing the class allegations to stand. . . . [N]o matter how easy it is to establish damages on a class level, if it is extremely difficult or almost impossible to distribute these sums to their rightful recipients, the class is unmanageable."[56]

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[52] Indirect Purchasers' Third Consolidated Amended Class Action Complaint ¶ 147.

[53] The objections and the futility of any inspection is set forth in detail in Defendants' papers.

[54] Hearing Tr. at 33:4–6 (emphasis added).

[55] *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998) (Rule 23 requires a class be defined, and "[a] class definition should be precise, objective, and presently ascertainable.") (internal quotation marks and citations omitted); *Davis v. Astrue*, 250 F.R.D. 476, 484 (N.D. Cal. 2008) ("[A]n implied prerequisite to certification is that the class must be sufficiently definite[, and a] defined class should be precise, objective, and presently ascertainable" (internal quotation marks and citations omitted)); *Whiteway v. FedEx Kinko's Office & Print Servs., Inc.*, No. C 05-2320 SBA, 2006 WL 2642528, at *3 (N.D. Cal. Sept. 14, 2006) ("The Court must be able to determine class members without having to answer numerous fact-intensive questions.").

[56] *In re Fresh Del Monte Pineapples Antitrust Litig.*, No. 1:04-md-1628 (RMB), 2008 WL 5661873, at *10 (S.D.N.Y. Feb. 20, 2008) (internal quotation marks and citations omitted) (finding

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Additionally, just as with legal damages claims, Plaintiffs seeking restitution have the burden to come forward with a realistic and sufficiently plausible methodology for showing pass-through on a class-wide basis using common proof. Restitution under the UCL or under unjust enrichment claims is only appropriate where a plaintiff shows that a defendant has received a benefit at the expense of the plaintiff.[57] In order to do that, Plaintiffs must show that they purchased products containing Defendants' SRAM, that such SRAM was subject to an alleged overcharge, and that such overcharge was "passed-through to them."[58] As Judge White explained in *In re Ditropan XL Antitrust Litig.*, indirect purchaser class action plaintiffs can only recover restitution under the UCL if they "are ultimately able to prove traceability."[59] But, as discussed in detail in Defendants' papers, Plaintiffs have failed to provide a realistic or sufficiently plausible methodology for tracing pass-through of any alleged overcharge throughout the chains of distribution. The failings of Plaintiffs' methodologies are even more stark with respect to a restitutionary claim, since Plaintiffs' current theory is that an overcharge will reappear at the consumer level even if it has been fully absorbed in a distribution chain. With such a theory, it is impossible to show that Plaintiffs' money ever actually reached a Defendant, either directly or indirectly. Given this, it would be improper to certify a class in California for legal damages or equitable restitution.

F. Can Plaintiffs Satisfy the Injury Requirement for Certification of a Damages or Restitutionary Class Under Rule 23(b)(3)? No.

For the reasons discussed in Defendants' other papers, Plaintiffs have not put forward a realistic nor sufficiently plausible methodology for showing pass-through with common proof on a class-wide basis. Moreover, Plaintiffs have not even been able to show that the individual putative class representatives suffered injury as a result of the alleged overcharge. As discussed above,

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class unmanageable where proposed formal claims procedure was not reliable method of distributing damages because, among other things, many claims were "not likely to be accurate or verifiable.")

[57] *Hirsch v. Bank of Am.*, 107 Cal. App. 4th 708, 721–22 (2003) ("An individual is required to make restitution when he or she has been unjustly enriched at the expense of another.").

[58] *Id.* at 722 (finding that appellants stated valid cause of action for unjust enrichment where excessive fees were passed-through and absorbed by appellants); *see also In re Ditropan Antitrust Litig.*, 529 F. Supp. 2d 1098 (N.D. Cal. 2007).

[59] 529 F. Supp. 2d 1098; *see also Hall v. Time, Inc.*, 158 Cal. App. 4th 847, 849 (2008) ("A plaintiff must have suffered an 'injury in fact' and 'lost money or property as a result of such unfair competition' to have standing to pursue either an individual or a representative claim under the [UCL].").

Plaintiffs have not and cannot establish ***any*** of the following: that (1) they purchased products containing SRAM; (2) the SRAM contained within their purchased products was manufactured by Defendants; (3) the particular SRAM was subject to an overcharge to a direct purchaser; (4) the direct purchaser passed through the overcharge; and finally (5) the overcharge was passed through the entire distribution chain all the way down to the class representatives.

G. Does the *B.W.I.* Presumption Apply When the Case Involves Components Which Are Added to or Altered in the Distribution Chain? No.

At the hearing, Plaintiffs' counsel, presumably arguing that this Court should apply a presumption of impact in order to certify a California class, noted that in *B.W.I. Custom Kitchen v. Owens-Ill., Inc.*,[60] all of the resellers admitted at deposition that they passed through the overcharge. (Hearing Tr. 18:3-4.) Thus, it is not surprising that *B.W.I.* applied a presumption of impact given that the fact of pass-through was not disputed. On the other hand, *B.W.I.* and its progeny make clear that a presumption of impact should ***not*** be applied in cases where component products are at issue that travel through multiple distribution chains and are altered or added to along the way. (*See* Surreply at 6:16-7:1 & n.26.) Here, the data and testimony show that many intermediaries absorbed alleged overcharges and did not pass them through. And SRAM, like DRAM in *Infineon*,[61] and like graphics processing units in *GPU*,[62] is a component that is sold in diverse distribution chains and is altered and added to in myriad ways as it travels through those distribution chains. Plaintiffs have cited ***no*** case, in ***any*** jurisdiction, where a court certified a class involving a component part that was altered or added to in diverse distribution chains. For these and numerous other reasons that have been fully briefed in Defendants' papers and at the hearing, a presumption of impact, as a matter of law, cannot be applied in this case under any state's laws.

H. Should the Court Bifurcate the Issue of Conspiracy from Injury? No.

Because conspiracy and fact of injury (impact) are both elements of liability, courts are disinclined to bifurcate these issues from one another, as there would be no judicial-economy benefit of doing so. Defendants could find no case where a court certified only one element of liability.

[60] 191 Cal. App. 3d 1341 (1987).

[61] *California v. Infineon Techs. AG*, No. C06-4333 PJH, 2008 WL 4155665 (N.D. Cal. Sept. 5, 2008).

[62] *In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478 (N.D. Cal. 2008).

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This is not surprising because a finding of conspiracy alone would accomplish nothing because it would not be enough to justify certifying a class or proceeding with the lawsuit. "Proof of an alleged conspiracy alone is not enough to establish antitrust liability." (*McCarter v. Abbott Labs.*, No. Civ.A. 91-050.1993, 1993 WL 13011463, at *6 (Ala. Cir. Ct. April 9, 1993).) Bifurcation therefore would not alleviate manageability problems, because impact must in any case be addressed at the class certification stage. (*See Keating v. Philip Morris, Inc.*, 417 N.W.2d 132, 138 (Minn. Ct. App. 1987) (declining to bifurcate trial between conspiracy and damages, because even with fact of conspiracy established, "the case would remain unmanageable").)

III. CONCLUSION

Plaintiffs fail to demonstrate the requisite actual case and controversy under Article III of the Constitution necessary to establish this Court's jurisdiction to hear their claims. Without such jurisdiction, the Court must *sua sponte* dismiss Plaintiffs' claims with prejudice. Moreover, this Court should do actual justice, not "rough justice," and deny class certification for failure to make a sufficient evidentiary showing of injury. The powerful class-action mechanism should be reserved for cases, unlike this one, where there is actual evidence that Plaintiffs have suffered an injury[63] and where the class-certification claims are based on realistic and sufficiently plausible methods of establishing class-wide injury.

Dated: September 16, 2009

Respectfully submitted,

WINSTON & STRAWN LLP

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and NEC ELECTRONICS AMERICA, INC.

I, Sean D. Meenan, hereby attest, pursuant to N.D. Cal. General Order No. 45, that the concurrence to the filing of this document has been obtained from each signatory hereto.

/s/ Sean D. Meenan
Sean D. Meenan

[63] Actual, and also imminent in the case of an injunction.

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Exhibit 1
September 3, 2009
Class Certification
Hearing Transcript

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE CLAUDIA WILKEN, JUDGE

IN RE STATIC RANDOM ACCESS (SRAM) ANTITRUST LITIGATION,	MDL C-07-1819 CW
	THURSDAY, SEPTEMBER 9, 2009
	OAKLAND, CALIFORNIA

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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THURSDAY, SEPTEMBER 3, 2009 2:00 P.M.

THE CLERK: CALLING THE MATTER OF IN RE SRAM, CIVIL ACTION NUMBER C-07-1819.

COUNSEL, PLEASE COME FORWARD.

THE COURT: WHAT WE WILL DO IS, THEY HAVE YOUR CARDS AND EVERYTHING. WE WILL JUST WRITE YOUR APPEARANCES DOWN IN

THE RECORD. WE DON'T NEED YOU ALL TO SAY WHO YOU ARE.

IF YOU COULD SAY WHO YOU ARE WHEN YOU SPEAK SO THE COURT REPORTER CAN GET WHO IS SPEAKING.

I DON'T KNOW IF WE HAVE DIRECT PURCHASER PEOPLE HERE, TOO, WHO WANT TO WEIGH IN ON ANYTHING OR IF WE ARE JUST WITH DEALING WITH INDIRECT PURCHASER PEOPLE.

IS THERE ANYONE HERE FROM DIRECT PURCHASER?

MR. SCARPULLA: MAY IT PLEASE THE COURT, FRANCIS SCARPULLA, YOUR HONOR, FOR THE INDIRECTS, BUT I BELIEVE YOUR HONOR SCHEDULED A CASE MANAGEMENT CONFERENCE FOR BOTH OF US AFTER THIS.

THE COURT: OKAY. SO SOMEBODY IS HERE FROM --

MR. WILLIAMS: STEVE WILLIAMS ON BEHALF OF THE DIRECT PURCHASERS.

THE COURT: OKAY.

MR. GRIFFIN: YOUR HONOR, PAUL GRIFFIN FOR NEC AND DEFENSE LIAISON COUNSEL.

WITH ME IS MY PARTNER. I WOULD LIKE TO INTRODUCE

PATRICK RYAN WHO WILL ADDRESS FOR ALL DEFENDANTS THE CLASS CERTIFICATION MOTION.

THE COURT: OKAY.

MR. RYAN: GOOD AFTERNOON, YOUR HONOR. PLEASURE TO BE BEFORE YOU AGAIN.

THE COURT: WHO IS ARGUING ON YOUR SIDE ABOUT CLASS CERTIFICATION? I JUST HAVE SOME QUESTIONS. I THINK THE EASIEST WOULD BE IF I CAN GET WHOEVER IS ARGUING FOR EACH SIDE TO COME UP.

MR. SCARPULLA: YOUR HONOR, THERE ARE TWO OF US

BECAUSE OF THE NUMBER OF ISSUES INVOLVED I CAN HANDLE SOME OF THEM, THE GENERAL KINDS OF THINGS, BUT MORE SPECIFICALLY FOR TYPICALITY, FOR THE EXPERT REPORTS ISSUES FOR BOTH THE CLASS CERTIFICATION AND THE TWO MOTIONS REGARDING THE EXPERTS, IT'S MR. MICHELETTI FROM MY OFFICE.

THE COURT: HE CAN STAND UP THERE, TOO.

SO, WHAT WOULD HAPPEN IF I DIDN'T CERTIFY THE CLASS AT ALL? I STILL HAVE ALL THESE CASES, I AM THE MDL JUDGE, WHAT WOULD I DO?

I GUESS THAT SHOULD BE ADDRESSED TO THE DEFENDANT.

MR. RYAN: WELL, IN THEORY, WE WOULD BE TRYING 47 --

THE COURT: I WOULDN'T TRY ANY OF THEM BECAUSE I WOULD BE THE MDL JUDGE AND I WOULD HAVE TO DO THE PRETRIAL PROCEEDINGS. ISN'T THAT RIGHT, I WOULD HAVE TO SEND ALL THE TRIALS BACK TO WHENCE THEY CAME?

MR. RYAN: I BELIEVE THAT'S CORRECT.

THE COURT: SO, BUT I WOULD HAVE TO DO ALL THE MOTIONS, ALL THE SUMMARY JUDGMENT MOTIONS AND EVERYTHING ELSE.

HOW MANY LAWSUITS ARE THERE WITH INDIRECT PURCHASER PLAINTIFFS IN THEM? 80? ALL THE CASES?

MR. RYAN: YES.

THE COURT: HAVE IP'S IN THEM, YES?

MR. RYAN: I THINK SO.

THE COURT: I WOULD THEN -- WE WOULD LITIGATE EACH OF THOSE 80 CASES SEPARATELY ON THE INDIRECT PURCHASERS, ALL THE MOTIONS AND EVERYTHING, AND THEN WE WOULD SEND THEM BACK FOR TRIAL?

MR. RYAN: THAT'S CORRECT, YOUR HONOR.

THE COURT: TO 80 DIFFERENT PLACES.

MR. RYAN: IF THEY SURVIVED.

THE COURT: COULD I -- I MEAN AT THE VERY LEAST IT SEEMS AS THOUGH THE ISSUE OF THE CONSPIRACY TO PRICE FIX IS THE SAME, NOT ONLY IN THIS CASE, BUT FOR THAT MATTER IN THE DIRECT PURCHASER CASE. I AM WONDERING WHETHER THERE COULD BE A WAY I CAN CERTIFY THE INDIRECT PURCHASERS FOR THE PURPOSE OF DETERMINING A CONSPIRACY TO PRICE FIX. AND I GUESS YOU ALL MIGHT WANT TO WEIGH IN ON THIS FOR THE DIRECT PURCHASERS, BUT COULD WE NOT HAVE FOR THE INDIRECTS BIFURCATE THAT ISSUE, AND COMBINE THE BIFURCATED ISSUE WITH THE FIRST PHASE OF THE TRIAL WITH THE DIRECT PURCHASERS AND HAVE A TRIAL IN WHICH WE

DETERMINE WHETHER THERE WAS A PRICE-FIXING CONSPIRACY. AND THEN THE INDIRECT PURCHASERS WOULD DROP OUT, AND THEY -- THE BIFURCATED PORTION OF THEIR CASE WOULD GO SOMEWHERE ELSE, WHETHER IT WOULD BE TO ANOTHER TRIAL OR BACK TO THEIR OWN DISTRICTS, MEANWHILE WE WOULD PROCEED WITH THE NEXT PHASE OF THE DIRECT PURCHASER CASE IN WHICH WE WOULD DO IMPACT AND DAMAGES.

MR. SCARPULLA: YOUR HONOR, FRANCIS SCARPULLA FOR THE INDIRECTS.

YOU DEFINITELY CAN BIFURCATE. YOU ARE PERMITTED TO DO THAT. IN FACT, SOME CASES HAVE DONE THAT.

THE COURT: THE DIRECT PURCHASER PLAINTIFFS, WOULD YOU HAVE A PROBLEM WITH THAT?

MR. WILLIAMS: NO, YOUR HONOR. I AGREE WITH MR. SCARPULLA. YOU HAVE THE DISCRETION TO DO THAT, AND I THINK THE ISSUES WOULD BE THE SAME.

THE COURT: OKAY.

SO HOW WOULD THAT WORK?

MR. RYAN: DEFENDANTS' POSITION IS, YOUR HONOR, YOU COULDN'T CERTIFY THE CLASS OF INDIRECTS FOR THAT PURPOSE, BUT YOU COULD CONSOLIDATE THE CASES FOR THAT ISSUE, THE INDIVIDUAL CASES. BECAUSE THE CRUX OF THE MATTER FOR INDIRECT PURCHASER CLASS AS WE'VE SHOWN IN THOSE CASES IS WHETHER THERE IS IMPACT, PASS THROUGH.

THE COURT: THEN I HAVE ANOTHER QUESTION ABOUT THAT.

I AM AFRAID I WILL GET OFF TRACK, BUT IS IT IMPACT OF EACH INDIVIDUAL OR IS IT WHETHER THERE IS A GENERAL MARKET IMPACT?

IN OTHER WORDS, I RECOGNIZE FOR DAMAGES WE WOULD HAVE TO LOOK AT EACH INDIVIDUAL AND SAY, YOU KNOW, WHAT'S IN YOUR CELL PHONE AND ALL OF THAT, BUT FOR MARKET IMPACT, WOULD THAT NOT BE A QUESTION OF MARKET-WIDE IMPACT AND NOT A QUESTION OF INDIVIDUAL IMPACT FOR EACH INDIVIDUAL PERSON.

MR. RYAN: I THINK THE ANSWER IS NEITHER OF WHAT YOU SAID. THE STANDARD IS HAVE PLAINTIFFS PUT FORTH A REALISTIC AND SUFFICIENT AND PLAUSIBLE METHODOLOGY FOR SHOWING IMPACT USING COMMON PROOF ON A CLASS-WIDE BASIS.

THE COURT: I AM NOT ASKING THAT. I AM ASKING WHAT DOES THE ELEMENT OF THE CAUSE OF ACTION REQUIRE THEM TO SHOW? FORGET WHETHER IT'S A CLASS OR NOT A CLASS, WHAT DO THEY HAVE TO SHOW ABOUT IMPACT IN ORDER TO MAINTAIN THEIR CAUSE OF ACTION?

MR. RYAN: PLAINTIFF IS REQUIRED TO SHOW INJURY. THAT'S AN ELEMENT OF THE CLAIM FOR RELIEF.

THE COURT: THAT'S DAMAGES -- INJURY AND THEN

DAMAGES.

MR. RYAN: YES. INJURY IS IMPACT. THAT'S AN ELEMENT OF THE CLAIM FOR RELIEF, AND THAT CANNOT BE DONE ON A MARKET-WIDE BASIS.

THE COURT: AND YOU'RE SAYING THAT IS INDIVIDUAL INJURY, NOT IMPACT ON THE MARKET.

MR. RYAN: THAT'S CORRECT, YOUR HONOR.

THE COURT: WHAT WOULD BE A GOOD CASE THAT WOULD SAY THAT? JUST SORT OF DUMMY LEVEL, BLACK LETTER LAW CASE THAT WOULD SAY THAT'S WHAT IT IS?

MR. RYAN: HOW ABOUT ILLINOIS BRICK? ILLINOIS BRICK SAYS YOU HAVE TO DO IT ON A POINT BY POINT ALL THE WAY DOWN TO THE INDIVIDUAL PLAINTIFF. 1977.

THE COURT: OKAY.

NOW WHAT IF WE CERTIFIED A CLASS -- WELL, LET ME ASK YOU, WHAT IS YOUR IDEA HERE? ARE YOU THINKING WE CERTIFY A NATIONWIDE CLASS JUST FOR PURPOSES OF EQUITABLE RELIEF AND THAT PROVIDES A VEHICLE FOR NO DAMAGES AT ALL, IT PROVIDES A VEHICLE ONLY FOR AN INJUNCTION? AND THEN IN ADDITION TO THAT, WE CERTIFY 27 DIFFERENT STATE CLASSES PURSUANT TO WHICH INDIVIDUALS CAN SEEK DAMAGES? IS THAT YOUR CONCEPT?

MR. SCARPULLA: THAT IS EXACTLY WHAT WE ASKED FOR, YOUR HONOR, YES.

THE COURT: YOU WOULDN'T BE SEEKING ANY DAMAGES IN THE INJUNCTIVE CLASS.

MR. SCARPULLA: NO, WE WOULDN'T BE ENTITLED TO DAMAGES UNDER SECTION 15 OF THE CLAYTON ACT FOR VIOLATIONS OF SECTION 1 OF THE SHERMAN ACT WHICH INDIRECT PURCHASERS ARE

PERMITTED TO BRING INITIALLY IN FEDERAL DISTRICT COURTS.
HOWEVER, A NUMBER OF THE STATES FOR WHICH WE HAVE REQUESTED STATEWIDE CLASSES BASED ONLY ON THAT PARTICULAR

STATE'S LAWS PERMIT INJUNCTIVE CASES WHICH INCLUDE RESTITUTION OR DISGORGEMENT. FOR EXAMPLE --
THE COURT: RIGHT. SOME OF THE INDIVIDUAL STATES YOU CAN CERTIFY A CLASS FOR THAT STATE THAT WOULD GET DAMAGES OR RESTITUTION.
MR. SCARPULLA: NO DAMAGES. THAT'S THE DIFFERENCE.
THE COURT: EVEN RESTITUTION PURSUANT TO VARIOUS STATES. SO THAT'S WHAT YOU ARE PROPOSING THEN.
MR. SCARPULLA: YES. BUT IN THOSE STATES, YOUR HONOR, THE DIFFERENCE IS THAT IF YOU VIEW IT ONLY AS AN EQUITABLE REMEDY AND, THEREFORE, NO DAMAGES, THE PLAINTIFFS IN THOSE STATEWIDE CLASSES DO NOT HAVE THE NECESSITY TO SHOW PASS-ON. THAT IS NOT AN ELEMENT. THE ONLY ELEMENT IS HOW MUCH MONEY DID THE DEFENDANTS TAKE THAT DOES NOT BELONG TO THEM. IT HAS NOTHING TO DO WHETHER IT WAS PASSED ON --
THE COURT: IF THESE ARE JUST EQUITABLE, IS THERE A JURY TRIAL RIGHT?
MR. SCARPULLA: NO. WE TRY THAT TO YOU.
THE COURT: EVEN THE NATIONWIDE CLASS FOR EQUITABLE RELIEF, I GUESS.
MR. SCARPULLA: CORRECT, YOUR HONOR. IF WE DO IT IN CONJUNCTION WITH THE DIRECTS, THEN YOU DO EVERYTHING IN ONE -- THERE ISN'T A JURY FOR US.
THE COURT: I DECIDE THE CONSPIRACY QUESTION.
MR. SCARPULLA: YOU WOULD TRY THE CONSPIRACY --

THE COURT: FOR YOUR CASE --
MR. SCARPULLA: FOR MY CASE.
THE COURT: -- WHILE A JURY WAS DECIDING THE CONSPIRACY QUESTION FOR DIRECT PURCHASERS.
MR. SCARPULLA: MY RECOLLECTION IS, YOUR HONOR, THAT YOU ARE PERMITTED TO ASK THEM FOR AN ADVISORY OPINION.
THE COURT: I COULD. OKAY. THAT IS INTERESTING.
SO WHAT IF I CERTIFIED A NATIONWIDE CLASS FOR EQUITABLE RELIEF AND CERTIFIED ONLY A CALIFORNIA CLASS FOR WHATEVER YOU CAN GET IN CALIFORNIA, AND DIDN'T CERTIFY ALL THE OTHER STATES, BUT DID THEIR PRETRIAL WORK AND THEN SENT THEM BACK TO THEIR RESPECTIVE STATES TO SEE IF THE JUDGES IN THOSE STATES WANTED TO CERTIFY AN IN-STATE CLASS FOR THEM OR NOT?
MR. SCARPULLA: THAT'S FINE.
THE COURT: BUT YOU WOULD RATHER HAVE ME CERTIFY ALL OF THEM, I GUESS.
MR. SCARPULLA: WELL, YOUR HONOR, IT WOULD MAKE IT A NICE -- IT WOULD MAKE IT AN EASIER PACKAGE TO DEAL WITH. BUT, YOU KNOW, PRIOR TO CAFA, YOUR HONOR, WE USED TO DO THIS ALL THE TIME. WE FLEW ALL OVER THIS COUNTRY. WENT TO ALL THESE LITTLE SMALL TOWNS WHERE THESE CASES WERE PENDING.
THE COURT: YOU WOULD BE IN FEDERAL COURT. YOU WOULD BE IN FEDERAL COURT IN EACH OF THE STATES.
MR. SCARPULLA: UNLESS YOU DIDN'T MEET THE JURISDICTIONAL REQUIREMENTS OF CAFA, THEN YOU WOULD GO BACK TO

THE STATE COURTS.

THE COURT: NOW WHAT'S YOUR VIEW ABOUT WHAT I WAS SPEAKING WITH COUNSEL ABOUT IN TERMS OF THE -- WHAT ARE THE ELEMENTS OF THE -- WHAT IS NECESSARY TO PROVE THE IMPACT ELEMENT? IS THAT REALLY INDIVIDUAL INJURY OR IS IT MARKET-WIDE IMPACT?

MR. SCARPULLA: MOST OF THE -- AGAIN, IF WE ARE TALKING ABOUT THE STATE LAW CLAIMS THAT ARE HERE INDIVIDUALLY --

THE COURT: LET'S START BY TALKING ABOUT THE NATIONWIDE EQUITABLE CLAIM.

MR. SCARPULLA: THE NATIONWIDE EQUITABLE CLAIMS, IF YOU -- IF WE PROVE THAT THE DEFENDANTS ENGAGED IN A HORIZONTAL CONSPIRACY, THE PURPOSE AND EFFECT OF WHICH WAS TO RAISE THE PRICES OF SRAM IN THE UNITED STATES, THAT IN AND OF ITSELF IS SUFFICIENT BECAUSE WE ARE NOT CLAIMING DAMAGES IN THAT CASE.

THE COURT: YOU DON'T HAVE TO PROVE IMPACT?

MR. SCARPULLA: BUT THERE IS IMPACT. BECAUSE ONCE YOU FIX PRICES, IF ANYBODY BUYS IT, THERE'S AN IMPACT AND YOU CAN ENJOIN THEM.

THE COURT: DO YOU HAVE TO PROVE THAT IN ORDER TO PREVAIL ON THAT CAUSE OF ACTION?

MR. SCARPULLA: NO, I THINK -- WE ARE TALKING ONLY INJUNCTIVE RELIEF. WE ONLY HAVE TO PROVE THE SAME THING THE GOVERNMENT HAS TO PROVE IN AN INJUNCTIVE RELIEF CLAIM, AND THE

GOVERNMENT CAN NEVER CLAIM DAMAGES.

THE COURT: NO, NO, BUT IMPACT, DO YOU HAVE TO PROVE

IMPACT?

MR. SCARPULLA: THAT IS IMPACT. ONCE YOU PROVE A HORIZONTAL PRICE-FIXING CONSPIRACY THAT EFFECTED COMMERCE AND THAT THAT ITEM WAS SOLD TO SOMEONE, THERE IS IMPACT.

THE COURT: BUT FOR THE INDIVIDUAL STATES, I GUESS, IT WOULD DEPEND ON LAW OF EACH PARTICULAR STATE AS TO WHETHER YOU DID HAVE TO PROVE IMPACT.

MR. SCARPULLA: CORRECT.

THE COURT: AND WHETHER THAT IMPACT WAS NECESSARILY AN INDIVIDUAL IMPACT OR COULD IT BE A BROADER MARKET IMPACT.

MR. SCARPULLA: THAT'S CORRECT, YOUR HONOR. AND A LOT OF THE STATES THAT HAVE CONSIDERED IT HAVE SAID THAT IT'S -- THAT YOU GET THE PRESUMPTION OF IMPACT. NOT NECESSARILY AMOUNT OF DAMAGE, BUT YOU GET THE PRESUMPTION OF IMPACT.

THE COURT: NOW, BACK TO THE QUESTION OF WHETHER THE FIRST PART COULD BE TRIED TOGETHER, IS THERE A DIFFERENCE IN THE DEFENDANTS SOMEHOW? ARE THERE DIFFERENT DEFENDANTS IN THE IP VERSUS UP?

MR. SCARPULLA: I DON'T THINK SO.

THE COURT: WE WERE TRYING TO MATCH EVERYBODY UP AND IT DIDN'T MATCH.

MR. SCARPULLA: I THINK THERE IS ONLY ONE THAT WE DO

NOT HAVE, AND I THINK IT IS ISSI, BUT I AM NOT POSITIVE. MAYBE MR. GRIFFIN.

MR. GRIFFIN: YOUR HONOR, PAUL GRIFFIN FOR NEC. I BELIEVE THERE ARE A COUPLE OF DEFENDANTS THAT DIFFER BETWEEN THE TWO CASES. I THINK ONE IS ISSI AND ONE MIGHT BE HITACHI OR

RENESAS.

THE COURT: IT'S NOT A TERRIBLE HURDLE.

MR. SCARPULLA: NO.

THE COURT: IT'S NOT LIKE SOME HUGE DIFFERENCE.

MR. SCARPULLA: NO.

THE COURT: OKAY.

NOW, WHAT ABOUT THIS PROBLEM THAT THE DEFENDANTS RAISE, AND I GUESS IT WOULD GO -- UNDER THEIR THEORY IT GOES TO IMPACT, BUT AT LEAST UNDER EVERYBODY'S THEORY IT GOES TO, WELL, NOT DAMAGES, BUT I GUESS RESTITUTION, AND THAT IS THE PROBLEM WITH IDENTIFYING WHETHER ANY PARTICULAR PERSON GOT SRAM AT ALL. AND IF THEY DID, DID THEY GET IT FROM A DEFENDANT.

MR. SCARPULLA: WELL, YOUR HONOR, YOU KNOW, I READ THESE -- I READ THE DEFENDANTS' PAPERS ON THAT POINT. AND I HAVE BEEN AT DEPOSITIONS WHERE DEFENSE WITNESSES HAVE TESTIFIED ABOUT THAT VERY ISSUE. AND, IN FACT, WE TOOK A DEPOSITION OF SOME FELLOW FROM SAMSUNG WHO SPECIFIC JOB WAS TO CONTACT COMPETITORS AND FIND OUT WHAT MARKET SHARES WERE. AND HE USED TO DO IT ON A REGULAR BASIS TO KEEP MARKET SHARE ANALYSIS. AND HE TESTIFIED THAT THE ONLY TWO PEOPLE THAT MAKE ANY DIFFERENCE

IN THIS CASE IS SAMSUNG AND CYPRESS. THEY ARE THE TWO BIG GUYS. EVERYBODY ELSE IS SMALL. WE'RE TALKING ABOUT NICKELS AND DIMES.

THE COURT: YOU'VE ONLY GOT 60 TO 70 PERCENT OF THE MARKET SHARE.

MR. SCARPULLA: PARDON ME?

THE COURT: THE DEFENDANTS ONLY HAVE 60 TO 70 PERCENT OF MARKET SHARE I AM TOLD.

MR. SCARPULLA: WELL, YOU KNOW, THAT'S WHAT THEY SAY. I DON'T THINK THAT'S CORRECT.

THE COURT: OH.

MR. SCARPULLA: I THINK THEY HAVE A LOT MORE MARKET SHARE, YOUR HONOR.

THE COURT: EVEN IF THEY HAVE 99.9 PERCENT, THERE IS STILL SOME GUY OUT THERE WHO HAS A CELL PHONE THAT GOT THE SRAM SOMEWHERE ELSE. WHAT DO WE DO ABOUT THAT GUY?

MR. SCARPULLA: YOUR HONOR, THAT'S WHAT HAPPENS WITH -- THAT WAS THE OTHER ENIGMA WHICH I HAD TO PONDER WHEN I WAS READING ALL OF THIS.

BECAUSE FOR 30 YEARS STATE COURT JUDGES HAVE DEALT WITH INDIRECT PURCHASER CASES EXACTLY LIKE THIS. THIS COMES UP EVERY TIME THERE IS AN INDIRECT PURCHASER CASE IN A STATE COURT. BUT YOUR HONOR'S EXPERIENCE HAS NOT BEEN THAT BECAUSE SINCE 1977 WE COULDN'T BE HERE. SO --

THE COURT: I WASN'T ON THE BENCH THEN, SO I DIDN'T

HAVE THAT PROBLEM.

MR. SCARPULLA: -- AS THE LAW WAS BEING DEVELOPED AS STATE COURT JUDGES DID.

DIRECT PURCHASER CASES ARE FAIRLY EASY. THEY'RE NICE LITTLE PACKAGES. YOU HAVE A GROUP OF DEFENDANTS. THEY SELL TO A SMALLER GROUP OF LARGE COMPANIES, AND THAT'S IT. YOU DON'T GO BELOW THEM IN THE FEDERAL DISTRICT COURTS UNTIL RECENTLY WITH CAFA. SO THAT'S IS NICE LITTLE PACKAGE. IT'S A LITTLE TIFFANY BLUE BOX WITH A RED RIBBON AROUND IT IS.

THE COURT: WHITE.

MR. SCARPULLA: WHITE, EXCEPT AT CHRISTMASTIME.

(LAUGHTER.)

MR. SCARPULLA: AND THEN AS YOU GO BELOW THEM AND GET INTO STATE COURT ISSUES, IT GETS A LITTLE MESSY. YOU CAN'T HELP IT, THEY ARE CONSUMERS. AND THEY DON'T --

THE COURT: WHAT DO YOU DO ABOUT IT?

MR. SCARPULLA: YOU TRY AND DO ROUGH JUSTICE. THAT IS -- WHAT DO YOU DO ABOUT IT? YOU CAN'T LET -- IF WE ARE CORRECT THAT THERE IS THIS PRICE-FIXING GOING ON, THEN THE DEFENDANTS HAVE TAKEN SOMETHING ILLEGALLY FROM US, AND WE ARE ENTITLED TO GET IT BACK.

AND THE DIFFICULTIES OF PROOF ARE NOT THE PLAINTIFFS DOING, IT'S THE NATURE, SCOPE, EXTENT AND DURATION OF THE CONSPIRACY. IF YOU ONLY HAVE TWO PEOPLE CONSPIRING TO FIX A PRICE TO A THIRD PARTY ON A VERY LIMITED COMMERCE, THAT'S AN

EASY ONE. IT'S WHEN YOU HAVE A NUMBER OF DEFENDANTS FIXING A LOT OF PRICES ON A LOT OF THEIR PRODUCTS TO A LOT OF PEOPLE WHO THEN RESELL IT ON DOWN THE CHAIN, SO THAT THOSE DEFENDANTS CAN MAKE MORE MONEY, THAT'S WHAT WE ARE TALKING ABOUT HERE. THEY MAKE MORE MONEY BY FIXING PRICES THAN COMPETING. SO YOU CAN'T LET THEM KEEP IT.

AND I RESPECTFULLY SUGGEST THAT IT'S EITHER THROUGH EQUITABLE RESTITUTIONARY PROCEDURES THAT YOU GIVE IT BACK TO US OR THROUGH DAMAGE ACTION.

I AM NOT TELLING YOU THAT I AM GOING TO WIN THIS CASE AT TRIAL, BUT THESE ARE ALL COMMON ISSUES. THEY ARE COMMON QUESTIONS. THEY SHOULD BE DECIDED ONCE. AND IT DOESN'T MATTER WHETHER YOU HAVE 47 OR 80 PLAINTIFFS OR THE MILLIONS IN BACK OF THEM. IT'S GOING TO BE THE SAME EVIDENCE, THE SAME

PEOPLE ON THAT STAND, THE SAME PEOPLE IN THAT BOX.

THIS IS -- I HAVE DONE THIS BEFORE. I HAVE DONE IT FOR 42 YEARS, YOUR HONOR.

THE COURT: SO WHY DID YOU GO TO ALL THE TROUBLE OF HIRING THESE ECONOMISTS TO TELL US ABOUT THE IMPACT IF YOU REALLY DIDN'T HAVE TO?

MR. SCARPULLA: YOU WANT ME TO TELL YOU WHY?

BECAUSE OF THE NINTH CIRCUIT. BECAUSE IF YOU DON'T WATCH OUT AND YOU TRY SOMETHING HERE, YOU DON'T PUT ALL THAT STUFF IN THE RECORD, YOU GO UP THERE, SOMEBODY WILL SAY TO YOU, WHY DIDN'T YOU HAVE AN ECONOMIST? AND YOU WILL GET REVERSED.

SO YOU COVER YOURSELF. THAT'S WHY YOU DO IT.

IN BWI I HAD -- THAT WAS MY CASE. I HAD NO ECONOMIST. NONE. I TOOK THE DEPOSITIONS OF THE RESELLERS AND THEY TOLD ME, I PASS EVERYTHING ON. THEY CAN'T NOT PASS IT ON, YOUR HONOR. I DON'T CARE WHAT PEOPLE ARE TELLING YOU, BECAUSE IF THEY DIDN'T SELL GOODS AT THE COST OF GOODS, THEY WOULD BE BROKE IN A WEEK AND A HALF.

THE COURT: WELL, IN GENERAL THAT'S TRUE. THERE ARE ALL THESE CIRCUMSTANCES WHERE SOMETIMES MAYBE THEY DON'T. IF THEY ARE DOING A PROMOTION, THEY'RE DOING SOME KIND OF LOSS LEADER, SELLING --

MR. SCARPULLA: THAT MAY BE SELLING BELOW THEIR INCREMENTAL COST, BUT WE ARE TALKING ABOUT SALES BELOW COST OF GOODS. THAT'S DIFFERENT.

NOW, THAT CAN OCCUR MAYBE ON THE EDGES FOR A LITTLE BIT OF TIME. IT HAS NO IMPACT ON THE CASE. IT'S IRRELEVANT. IT JUST DOESN'T HAPPEN.

THE COURT: WHAT ABOUT THE PERSON WHO GOT THEIR PHONE THAT WAY?

MR. SCARPULLA: YEAH, BUT HOW MANY OF THEM ARE THERE?

THE COURT: I DON'T KNOW, BUT IF I HAVE A CLASS OF MILLIONS OF PEOPLE, I GUESS I HAVE TO FIND THEM.

MR. SCARPULLA: KYOCERA, WHATEVER THE NAME OF THAT TINY COMPANY, AND YOU NOTICE, DON'T YOU, THAT THEY DIDN'T START

DOING ALL THOSE LITTLE DOTS UNTIL FEBRUARY 2003. THIS CASE GOES BACK TO '96. WE DON'T KNOW ANYTHING ABOUT THAT FROM THEM DIRECTLY. AND THEN YOU SEE ALL THOSE LITTLE DOTS. YOU KNOW, I TRIED TO FIND OUT --

THE COURT: I LOST YOU ON THE LITTLE DOTS.

MR. SCARPULLA: THEY HAVE THIS GRAPH WHICH SHOWS SALES AND THEY HAVE COST. OKAY? AND THEN SO YOU HAVE A LOT OF DOTS ABOVE AND SOME DOTS BELOW, AND YOU HAVE ONE DOT AT ZERO.

SO THAT MEANS THEY DIDN'T MAKE ANYTHING ON THAT AT ALL. BUT YOU DON'T -- WE DON'T KNOW WHETHER THEY GAVE THAT TO SOMEBODY A -- YOU DON'T KNOW WHETHER IT IS ONE PHONE, WHETHER EACH DOT IS ONE PHONE OR EACH DOT IS A THOUSAND PHONES. I COULDN'T FIND IT ANYWHERE.

SO, WHEN YOU ARE TALKING ABOUT THIS AMOUNT OF COMMERCE IN A CONSUMER CASE, THOSE KINDS OF OUTLIER LITTLE ANOMALIES, IF YOU WILL, DOES NOT NEGATE THE COMMON QUESTIONS THAT PREDOMINATE.

THE COURT: AND IN TERMS OF THE INDIVIDUAL STATES, YOU REALLY DON'T CARE WHETHER I CERTIFY CALIFORNIA AND KEEP IT AND SEND ALL THE OTHERS BACK?

MR. SCARPULLA: NO, I DON'T CARE. BECAUSE I AM USED TO THAT. BUT WHAT I AM ASSUME YOUR HONOR WOULD DO, IF YOUR HONOR DID ANYTHING, YOU WOULD CERTIFY AN INJUNCTIVE RELIEF CLASS BECAUSE THAT'S NO DAMAGES. THEN YOUR HONOR WOULD CERTIFY CALIFORNIA, WHICH WE COULD THEN TRY TO YOUR HONOR. AND THEN AT

LEAST FOR LIABILITY, WE WOULD TRY THE OTHER CASES HERE IN CONJUNCTION WITH THE DIRECTS AND THEN YOU WOULD SEND THOSE BACK.

THE COURT: OKAY. DID YOU WANT TO RESPOND?

MR. RYAN: CAN I ADDRESS THOSE POINTS?

THE ELEMENT OF THE INJURY IS IN EVERY CLAIM FOR RELIEF I KNOW OF IN EVERY SINGLE STATE AND IT'S A REQUIREMENT FOR YOUR HONOR'S JURISDICTION, THAT THE PLAINTIFFS SHOW INJURY. INJURY IN THIS KIND OF CASE IS IMPACT. SO --

THE COURT: THEY ARE SAYING IN ORDER TO SHOW THE CONSPIRACY ELEMENT, THAT THAT INCLUDES AN INJURY COMPONENT WHICH SAYS THEY HAVE TO CONSPIRE TO FIX PRICES TO -- IN A WAY THAT EFFECTS THE MARKET. SO THAT HAS TO BE SHOWN IN SORT OF IN THE FIRST ELEMENT. AND IF THEY ARE ONLY SEEKING AN INJUNCTION, THAT'S ALL THEY HAVE TO SHOW.

MR. RYAN: I UNDERSTAND THAT'S WHAT HE IS SAYING, BUT THE ELEMENT IS INJURY, AND IT IS A SEPARATE ELEMENT. IT IS NOT SUBSUMED IN THE CONSPIRACY ELEMENT. AND EACH ONE OF THESE STATES, THEY DIDN'T PUT THE LAW OF THESE VARIOUS STATES --

THE COURT: LET'S START FIRST BY TALKING ABOUT THE EQUITABLE, THE NATIONWIDE EQUITABLE CLASS.

MR. RYAN: ABSOLUTELY, YOUR HONOR.

INJURY IS REQUIRED FOR YOUR HONOR TO HAVE

JURISDICTION TO ENTER AN INJUNCTION.

THE COURT: TO WHAT INJUNCTION?

MR. RYAN: TO HAVE JURISDICTION TO ENTER AN INJUNCTION.

THE COURT: TO ENTER AN. OKAY.

MR. RYAN: AND HERE, THE CLASS PERIOD ENDED IN 2006. THERE IS NO PROOF THAT THERE ARE PEOPLE BEING INJURED TODAY BY A CONSPIRACY.

IN FACT, DR. NOLAN, THE DIRECT CASE, SAID WHEN THE CRIMINAL INVESTIGATION BEGAN IN DRAM, THE SRAM CONSPIRACY, IF IT EXISTED, PRESUMABLY STOPPED. SO WHAT IS THERE TO ENJOIN? WHAT GIVES YOUR HONOR JURISDICTION? NOTHING. THERE IS NO JURISDICTION TO ENTER AN INJUNCTION IN THIS CASE. THAT'S THE FIRST POINT.

THE COURT: SO I SHOULD JUST DISMISS IT?

MR. RYAN: YOU SHOULD GET RID OF IT. YOU DON'T HAVE JURISDICTION.

THE COURT: WE ARE NOT TALKING ABOUT CLASS CERTIFICATION, YOU'RE MOVING TO DISMISS IT. I SHOULD JUST DISMISS IT OUTRIGHT RIGHT NOW?

MR. RYAN: ABSOLUTELY. YOUR HONOR DOESN'T HAVE JURISDICTION.

THE COURT: DID YOU MAKE A MOTION TO THAT EFFECT?

MR. RYAN: SUA SPONTE BUT WE'RE GETTING TO THE ISSUE RIGHT NOW OF CLASS CERTIFICATION. I WOULD BE HAPPY TO HAVE YOUR HONOR GET --

THE COURT: I JUST WONDER, IF IT IS SO EASY, WHY

SOMEONE DIDN'T MAKE THAT MOTION A LONG TIME AGO.

MR. RYAN: WELL, IT IS THAT EASY AND WE HAVE MADE THE POINTS, AND CERTIFICATION CANNOT BE GRANTED WHEN THERE IS NO SHOWING OF CURRENT RISK OF INJURY.

THE PLAINTIFFS IN AN INJUNCTIVE CASE HAVE TO SHOW THAT THEY ARE IN DANGER OF BEING INJURED. WHEN THE CLASS PERIOD IS OVER IN 2006, HOW CAN THEY SHOW THAT? THEY CAN'T.

THE COURT: IF YOU ARE STILL DOING IT, I SUPPOSE.

MR. RYAN: WELL, DR. NOLAN SAID IT ENDED WHEN THE CRIMINAL INVESTIGATION BEGAN BECAUSE APPARENTLY EVERYBODY, EVEN IF THERE WAS A CONSPIRACY, PEOPLE WERE AFRAID TO CONSPIRE.

SO THEY CAN'T HAVE IT BOTH WAYS. AND IF THEY REALLY THOUGHT THAT THERE WAS AN ONGOING CONSPIRACY RIGHT NOW, WHY DIDN'T THEY HAVE THE CLASS PERIOD BE LONGER? BECAUSE THEY DON'T BELIEVE THAT IT IS ONGOING RIGHT NOW. THEY BELIEVE IT ENDED IN 2006. THAT'S WHY THEY PLED THAT.

SO, IF I CAN MOVE ON TO A COUPLE OF OTHER OF MR. SCARPULLA'S POINT.

THE COURT: OKAY.

MR. RYAN: MR. SCARPULLA SAYS THAT WE'RE JUST TALKING ABOUT OUTLIERS HERE, AND REALLY YOU SHOULD JUST DO ROUGH JUSTICE AND IGNORE THE PROBLEMS OF ASCERTAINABILITY AND PASS THROUGH. WE ARE NOT TALKING ABOUT OUTLIERS. WE ARE TALKING ABOUT -- HE SAID -- HE COULDN'T REMEMBER THE NAME OF KYOCERA, K-Y-O-S-E-R-A. DURING THE CLASS PERIOD --

THE COURT: C-E-R.

MR. RYAN: C-E-R, EXCUSE ME. THANK YOU.

KYOCERA SOLD 60 TO 80 MILLION DEVICES DURING THE CLASS PERIOD THAT MEET DR. HARRIS' DEFINITION OF SMART PHONE.

FUTURE ELECTRONICS, WHICH A DISTRIBUTOR OF SRAM, DID, DURING THE CLASS PERIOD, $93 MILLION WORTH OF BUSINESS SELLING SRAM. AND WE HAVE CHART AFTER CHART SHOWING REPEATED SALES WHERE NO PASS THROUGH COULD HAPPEN; WHERE YOU'VE GOT PRICES GOING LIKE THIS, (INDICATING), AND YOU'VE GOT COSTS GOING LIKE THIS, (INDICATING), PASS THROUGH IMPOSSIBLE FOR TRANSACTION AFTER TRANSACTION AFTER TRANSACTION. $93 MILLION IN SALES IS NOT AN OUTLIER. WE PROVIDED NUMEROUS EXAMPLES WHERE PASS THROUGH WAS IMPOSSIBLE FOR MANY, MANY SALES. WE ARE TALKING ABOUT MILLIONS AND MILLIONS OF DEVICES SOLD WHERE PASS THROUGH WAS IMPOSSIBLE, YOUR HONOR. THAT -- THOSE ARE NOT OUTLIER ISSUES.

AND THE IDEA THAT THEY CAN ALL OF A SUDDEN SAY, WHAT WE SAID IN OUR COMPLAINT ABOUT HOW WE ARE GOING TO IDENTIFY THESE CLASS MEMBERS IS WE WILL JUST INSPECT THE PRODUCTS AND SEE IF THEY HAVE DEFENDANTS' SRAM IN IT. THAT'S WHAT THEY SAID THEY ARE GOING TO DO IN THEIR THIRD AMENDED COMPLAINT.

WE KNOW THEY CAN'T DO THAT. WE KNOW THEY CAN'T DO THAT BECAUSE THEIR OWN OBJECTIONS SAID WE WON'T LET YOU SEE OUR PRODUCTS. THESE ARE THE CLASS REPRESENTATIVES. WE WON'T LET YOU SEE OUR PRODUCTS TO SEE IF THERE ARE DEFENDANTS' SRAM IN

THEM, BECAUSE IF YOU LOOK, YOU WILL EITHER DESTROY THE PRODUCE OR YOU'RE GOING TO VOID ITS WARRANTY. OH, AND BY THE WAY, WE'VE LOST A BUNCH OF THEM. THEY CAN'T EVEN DO IT WITH THE CLASS REPRESENTATIVES.

AND IN THEIR COMPLAINT THEY SHOW US PICTURES OF WHAT THEY SAY IS SRAM. WELL, TWO OF THESE THINGS THEY PICTURED ARE DRAM. OKAY?

SO, THIS IS NOT EASY AND, IN FACT, THE EVIDENCE IS THAT A LOT OF THESE SRAM CHIPS, EVEN IF THEY ARE SRAM, HAVE NO IDENTIFYING MARKINGS ON THEM TO SAY WHO THEY ARE. AS YOUR HONOR CORRECTLY POINTED OUT, 30 TO 40 PERCENT OF THE MARKET ARE NONDEFENDANTS. THAT IS A LOT OF PRODUCTS. THAT IS A LOT OF SUBPRODUCTS.

NOW MR. SCARPULLA SAID THIS HAS BEEN GOING ON FOR YEARS AND YEARS AND I HAVE BEEN IN THE TRENCHES. YES, HE HAS. HE'S A FINE LAWYER. HE HAS BEEN IN THE TRENCHES. IT'S TELLING, MR. SCARPULLA, WHO KNOWS THIS LAW BACKWARDS AND FORWARDS IN THESE TRENCH CASES, HASN'T CITED A SINGLE CASE TO YOUR HONOR THAT IS FACTUALLY AND LEGALLY SIMILAR TO THIS ONE. IF THEY ARE OUT THERE, THEY ARE NOT IN THEIR BRIEFS. WE HAVEN'T SEEN THEM.

THIS IS A UNIQUE SITUATION, YOUR HONOR, PARTICULARLY GIVEN THE TYPE OF PRODUCT AT ISSUE. ON THE CONTRARY, DEFENDANTS HAVE CITED SEVERAL CASES TO YOUR HONOR THAT ARE VERY SIMILAR TO THIS ONE, FACTUALLY AND LEGALLY.

LET'S LOOK AT INFINEON. IN INFINEON, WE ARE TALKING ABOUT DRAM. WHAT COULD BE MORE SIMILAR TO SRAM THAN DRAM?

JUDGE HAMILTON RAISED NUMEROUS CONCERNS THAT APPLY EQUALLY HERE. INDEED, THOSE SAME CONCERNS APPLY WITH GREATER FORCE WITH SRAM.

LET ME GIVE YOU AN EXAMPLE. DRAM IS LESS DE MINIMIS AS FAR THE OVERALL SUBPRODUCTS THAN SRAM. DRAM, FOR EXAMPLE,

MAY RUN $50, SRAM MAY BE A TENTH OF THAT PRICE. AND AS WE LEARN --

THE COURT: SHE DIDN'T CERTIFY THE IP'S?

MR. RYAN: SHE DID NOT. SHE CERTIFIED THE DIRECTS.

THE COURT: AND THEN THE WHOLE THING HAS SETTLED OR IS IT STILL GOING ON?

MR. RYAN: THE INDIRECTS?

THE COURT: EITHER ONE.

MR. GRIFFIN: IT'S STILL PENDING, YOUR HONOR.

THE COURT: THE DIRECTS AND INDIRECTS?

MR. GRIFFIN: THE DIRECTS HAVE SETTLED. THE INDIRECTS ARE UP ON THE NINTH CIRCUIT.

THE COURT: THE INDIRECTS.

MR. GRIFFIN: THE INDIRECTS.

THE COURT: FOR APPEALING THE FAILURE TO CERTIFY THE CLASS?

MR. SCARPULLA: NO.

THE COURT: WHAT'S GOING ON?

I AM WONDERING WHAT HAPPENS TO YOU IF YOU DON'T CERTIFY THE CLASS?

MR. SCARPULLA: WE NEVER HAD A HEARING ON CLASS CERTIFICATION IN DRAM YET. THERE WAS A PORTION OF THE CASE THE JUDGE RULED ON IN TERMS OF A DIFFERENT ISSUE, WHICH SHE THEN CERTIFIED TO THE NINTH CIRCUIT, AND THEY ACCEPTED IT, AND SO WE ARE UP THERE BRIEFING IT, AND DURING THAT PERIOD JUDGE HAMILTON HAS STAYED THE REST OF THE CASE.

THE COURT: I SEE.

MR. GRIFFIN: I'M SORRY, YOUR HONOR. IT'S AT THE

NINTH CIRCUIT, BUT WE HADN'T GOTTEN TO THE INDIRECTS' CASE.

MR. SAVERI: YOUR HONOR, IF I MAY FOR A MINUTE. I'M GUIDO SAVERI AND REPRESENTED DRAM. I WAS LEAD COUNSEL. THE DIRECT CASE IS OVER AND WE ARE IN THE PROCESS OF DISTRIBUTING THE MONEY. IT'S OVER.

MR. RYAN: YOUR HONOR, I WOULD LIKE TO GO TO NOW TO JUDGE ALSUP DECISION IS GPU, GRAPHIC PROCESSING UNITS. IT'S ANOTHER COMPONENT PART. IT IS ALSO A MORE EXPENSIVE COMPONENT PART. AND WHEN YOU ARE LOOKING AT AN INDIRECT PURCHASER CASE --

THE COURT: WAS THAT AN MDL?

MR. RYAN: I BELIEVE IT WAS. YES, I BELIEVE IT WAS.

WHEN YOU ARE LOOKING AT A COMPONENT CASE LIKE THIS, AND THIS IS WHY I SAY THIS ISN'T LIKE THESE OTHER CASES, WHEN YOU ARE LOOKING AT A COMPONENT CASE, WHAT'S IMPORTANT AT THE

INDIRECT LEVEL IS TO LOOK AT THE MYRIAD OF POTENTIAL SUBPRODUCTS THAT THE COMPONENT CAN GO INTO BECAUSE EACH NEW SUBPRODUCT RESULTS IN VARIOUS NEW PATTERNS OF COMPLEX DISTRIBUTION CHANNELS.

IN THIS CASE, DR. HARRIS IDENTIFIED 14 SUBPRODUCTS THAT SRAM CAN GO INTO. UNLIKE -- BUT IN GPU, THERE WERE ONLY, I BELIEVE FIVE SUBPRODUCTS THAT GPU'S GO INTO. SO HERE, AS IN GPU, HE SAID WE HAVE GOT THESE DIVERGE AND DISTRIBUTION CHANNELS, IT MAKES IT TOO COMPLEX TO FIGURE OUT IMPACT. WE ARE GOING TO HAVE TO GO WHOLESALE OR RETAILER BY RETAILER TO FIGURE OUT IF PLAINTIFFS HAVE BEEN INJURED BECAUSE THERE IS ALL THIS COMPLEX ACTIVITY GOING ON. THERE IS NO WAY TO MODEL THIS. IT IS IMPOSSIBLE TO MODEL.

BUT WE HAVE MORE THAN DOUBLE THE SUBPRODUCTS IN THIS KIND OF CASE. WE ARE TALKING ABOUT ROUTERS, MAIN FRAMES, SWITCHES, COMPUTERS, SMART PHONES. WE HAVE GOT INDIRECT PURCHASERS LIKE CISCO AND WE'VE GOT MOM AND POP ELECTRICAL STORES. IT IS -- THAT'S ANOTHER PROBLEM. WE HAVE NO MAJOR LARGE ENTERPRISE CLASS REPRESENTATIVES. AND JUDGE ALSUP SAID, THAT'S A PROBLEM. HOW CAN YOU HAVE SMALL LITTLE COMPANIES OR INDIVIDUALS REPRESENTING THE INTERESTS OF THE GOOGLES, THE CISCOS OF THE WORLD BECAUSE THEY ARE ALSO INDIRECT PURCHASERS. ALL THOSE SERVER FARMS AT GOOGLE'S HEADQUARTERS, THEIR SERVER FARM, THEY ARE FILLED WITH SRAM. THEY ARE FILLED WITH SRAM. THEY ARE AN INDIRECT PURCHASER.

AND YOU'VE GOT ALL OF THESE INDICATIONS -- AND IF YOU LOOK AT EXHIBIT 13 WE PROVIDED, THAT IS A SIMPLIFIED DISTRIBUTION CHART. WE PUT IT IN OUR OMNIBUS REPLY BRIEF.

IT SHOWS HOW TRULY COMPLEX THIS IS. AND LET ME GIVE YOU ONE EXAMPLE, YOUR HONOR. FUTURE ELECTRONICS THAT WE TALKED ABOUT. IT IS A DISTRIBUTOR. OKAY? IT IS A DISTRIBUTOR THAT HAS THOUSANDS OF CUSTOMERS. JUST ONE DISTRIBUTOR HAS THOUSANDS OF CUSTOMERS. $92 MILLION IN SALES.

AND IF WE TAKE A DOLLAR, AND WE ASSUME THAT THAT'S AN OVERCHARGE, WE ASSUME A DOLLAR IS AN OVERCHARGE. OKAY? AND I AM FUTURE. PRETEND I AM FUTURE AND I HAVE THIS OVERCHARGE THAT I RECEIVED WHEN I PURCHASED A PRODUCT FROM DEFENDANT.

WHAT AM I GOING TO DO WITH IT? AM I GOING TO ABSORB IT, PUT IT IN MY POCKET, OR AM I GOING TO PASS IT THROUGH? OKAY?

WELL, IF I AM GOING TO PASS IT THROUGH, I WILL HAND

IT TO MS. GUILLEN HERE, AND SHE'S A RETAILER. DR. HARRIS TALKS ABOUT FUTURE SELLING TO A RETAILER. THAT'S WHY I AM USING THIS EXAMPLE. MS. GUILLEN GIVES IT TO MR. GRIFFIN, HER CUSTOMER, A CONSUMER. THAT'S PASS THROUGH.

THE COURT: I GET IT.

(LAUGHTER.)

MR. RYAN: ALL RIGHT. BUT IF I AM FUTURE AND I DECIDE TO KEEP THIS DOLLAR, I PUT IT IN MY POCKET, I ABSORB THAT OVERCHARGE, AND I REACH OUT TO MS. CAHILL AND SELL HER A

PRODUCT. MS. CAHILL HAS NOT RECEIVED AN OVERCHARGE. SHE'S GOT NO OVERCHARGE TO PASS THROUGH TO YOUR HONOR IF YOU'RE HER CONSUMER CUSTOMER.

WHAT PLAINTIFFS ARE TELLING YOU, YOUR HONOR, IS THAT ANOTHER DOLLAR HAS JUST REAPPEARED AT YOUR DESK. THERE IS A DOLLAR HERE AND THERE IS A DOLLAR THERE. THAT'S THEIR THEORY. THAT'S THEIR THEORY. THAT'S DOUBLE COUNTING. THAT'S DOUBLE DAMAGES. THAT DOLLAR IS STILL HERE BECAUSE FUTURE, THE CHART SAY, ABSORBED A LOT OF THOSE PASS THROUGHS, IT'S STILL THE FUTURE, IT CAN'T BE AT YOUR HONOR'S DESK. THAT'S WHY THEIR THEORY IS NOT REALISTIC OR SUFFICIENTLY POSSIBLE ON PASS THROUGH.

THE COURT: SO WHAT IS YOUR VIEW IF I WERE TO CERTIFY A NATIONWIDE CLASS FOR EQUITABLE RELIEF AND A CALIFORNIA CLASS FOR THE CALIFORNIA CAUSES OF ACTION AND LEAVING ME 26 OTHER STATES WORTH OF CASES, WHAT IS YOUR VIEW ABOUT WHAT I SHOULD DO WITH THOSE? CERTIFY 26 MORE CLASSES OR SEND THEM ALL BACK AFTER DOING ALL OF THE PRETRIAL WORK?

MR. RYAN: EXCUSE ME, YOUR HONOR, THAT'S OVER MY PAY

GRADE.

(PAUSE IN THE PROCEEDINGS.)

MR. RYAN: OUR POSITION IS YOU SHOULDN'T CERTIFY ANY CLASS.

THE COURT: OKAY.

SO YOU WILL LEAVE IT TO ME ABOUT WHAT TO DO WITH THE

OTHERS?

MR. RYAN: (NODS HEAD.)

THE COURT: OKAY.

DID YOU HAVE ANY RESPONSE YOU WANT TO GIVE TO ANYTHING HE SAID?

ACTUALLY, I AM SORRY, LET ME ASK YOU ONE OTHER QUESTION. WHEN I ASKED YOU FOR A CASE THAT TOLD ME I NEEDED TO FIND INDIVIDUALIZED IMPACTS, YOU GAVE ME ILLINOIS BRICK. AND THAT CASE SAID THAT YOU CAN'T -- THAT INDIRECT PURCHASERS CAN'T RECOVER DAMAGES. DOES THAT CASE SAY THAT FOR INJUNCTIVE RELIEF THAT INDIVIDUALIZED IMPACT MUST BE SHOWN?

MR. RYAN: I CAN'T RECALL.

WHAT I CAN SAY IS WHAT ILLINOIS BRICK DOES DEFINE WHAT INJURY IS IN THESE CASES, AND WHAT IT SAYS IS --

THE COURT: RIGHT. BUT IT SAYS THAT THEY CAN'T GET DAMAGES, BUT THEY ARE NOT SEEKING DAMAGES.

MR. RYAN: THAT'S RIGHT. WHAT THEY SAY PASS THROUGH IS, WHAT INJURY IS, IS THE DEMONSTRATION OF HOW MUCH OF THE OVERCHARGE WAS PASSED ON BY THE FIRST PURCHASER MUST BE REPEATED AT EACH POINT AT WHICH THE PRICE FIX GOODS CHANGED HANDS BEFORE THEY REACHED THE PLAINTIFF.

THE COURT: OKAY.

MR. SCARPULLA: YOUR HONOR, MY RECOLLECTION -- ON THAT ISSUE, MY RECOLLECTION IS THERE IS A SUBSEQUENT OPINION FROM A FEDERAL DISTRICT COURT. I BELIEVE EITHER CIRCUIT COURT

OF APPEALS OR MAYBE EVEN THE SUPREME COURT WHICH PERMITTED INDIRECT PURCHASERS TO BRING INJUNCTIVE RELIEF CASES IN ANTITRUST CASES. AND I THINK THAT THAT ISSUE WAS IN THERE. AND I AM SORRY I'VE FORGOTTEN THE NAME OF IT. SO IF I MAY, YOUR HONOR, WE WILL GET IT FOR YOU --

THE COURT: IT MUST ME BE IN THE BRIEFS SOMEWHERE.

MR. SCARPULLA: IT MAY BE SOMEWHERE IN THERE, YOUR HONOR. I'M SORRY, THERE WERE SO MANY PIECES OF PAPER THAT I CAN'T REMEMBER THAT RIGHT NOW.

IN ANY EVENT, I KNOW THERE IS A SUBSEQUENT CASE TO ILLINOIS BRICK ON THAT VERY ISSUE.

THE COURT: OKAY.

MR. SCARPULLA: IF I CAN SAY ONE THING ABOUT THAT DOLLAR PASSING AROUND, OKAY? AS LONG AS THE COST OF GOODS GOES DOWN THROUGH THE CHAIN, THERE MAY BE ABSORPTION BY OTHERS IN THE CHAIN, BUT THAT IS A DIFFERENT CLAIM. THOSE ARE LOST PROFIT CLAIMS. THAT'S NOT A CLAIM I PAID MORE FOR THIS PRODUCT BECAUSE YOU, DEFENDANTS, FIXED THE PRICE. IT IS A DIFFERENT ANALYSIS. IT'S A DIFFERENT CLAIM. THAT'S THE DISTINCTION HERE.

LOST PROFITS FOR THE INTERMEDIARIES, BECAUSE THERE MAY BE SOME ABSORPTION, ALTHOUGH THE GRAFTS DON'T SHOW IT, OUR ECONOMIST DOESN'T SHOW ANY ABSORPTION DOWN THROUGH THE CHAIN IN GROSS NUMBERS. NOW, THAT DOESN'T MEAN THAT ON THE EDGES THERE ISN'T, BUT I AM JUST SUGGESTING THAT.

IF YOUR HONOR PLEASE, I JUST WANT -- EXHIBIT 3 TO THE -- I THINK IT IS HARRIS' OR DWYER'S DECLARATION, IS A COMPELLING PICTURE OF FUTURE ELECTRONICS. THIS IS THE ONE THEY ARE TELLING YOU ABOUT.

WHAT WE DID IS WE TOOK THEIR ECONOMISTS' DATA, WHICH IS ON THE LEFT SIDE, AND WE DID IT AS A BAR GRAPH -- AS A GRAPH. YOU CAN TAKE A LOOK AT IT.

THE BLUE IS WHAT THEY SOLD IT FOR AND THE RED IS WHAT THEY PAID FOR IT. IT IS ALL ABOVE THE COST. I MEAN, THIS IS THE WHOLE CASE RIGHT THERE (INDICATING). THAT'S IT RIGHT THERE. AND YOU CAN TELL FROM IT, FROM JUST THIS ONE -- FOR JUST THIS ONE, THEY SOLD EVERYTHING MORE THAN WHAT THEY PAID FOR. SO YOU HAVE IMPACT. JUDGE, SUPPOSE --

MR. RYAN: YOUR HONOR.

MR. SCARPULLA: SUPPOSE SOMEBODY IS FIXING PRICES ON THESE CUPS. AND YOU, YOUR HONOR, BUYS IT, AND YOU PAY THAT FIXED PRICE. WHAT ELSE DO I HAVE TO SHOW THAT YOU HAVE SUFFERED AN ANTITRUST INJURY? FORGET ABOUT THE DAMAGE. WHAT ELSE DO I HAVE TO SHOW THAT YOU SUFFERED ANTITRUST INJURY?

NOTHING. ALL I HAVE TO SHOW IS THE PRICE OF THIS CUP WAS FIXED AND THAT YOU BOUGHT IT.

THE COURT: GETTING BACK TO THE INDIVIDUALIZED -- I GUESS NOT DAMAGES, YOU'D HAVE TO CALL IT RESTITUTION IN YOUR EQUITABLE CLAIM, INDIVIDUALIZED PROOF OF RESTITUTION, HOW WOULD WE GO ABOUT DOING THAT? WHAT, EVERYBODY COMES IN AND EACH

PLAINTIFF HAS TO PROVE THEIR DAMAGES SO THEY HAVE TO COME IN --

MR. SCARPULLA: NO, NO, NO.

THE COURT: -- OPEN UP THEIR CELL PHONE?

MR. SCARPULLA: THE PLAINTIFFS DON'T HAVE TO PROVE ANYTHING. THE PLAINTIFFS DON'T HAVE TO PROVE INDIVIDUAL DAMAGES.

THE COURT: RESTITUTION, ELIGIBILITY FOR RESTITUTION.

MR. SCARPULLA: THAT'S CLAIMS PROCEDURE. THAT'S DIFFERENT. ALL WE HAVE TO DO IS GET AN ACCOUNTANT. FORGET ALL THE EXPERTS. ALL YOU NEED IS AN ACCOUNTANT TO GO TO EACH DEFENDANT'S BOOKS, FIND OUT HOW MUCH PROFIT THEY MADE ON SRAM SALES IN THE UNITED STATES, BILLED TO, SHIPPED TO U.S., THAT'S IT. THEY HAVE TO GIVE IT BACK IF THEY ARE GUILTY OF FIXING PRICES. IF THEY ARE NOT, I LOSE.

IF THE JURY SAYS, MR. SCARPULLA, PLAINTIFFS, YOU LOSE, THEN THAT'S THE END OF IT. ONCE THEY FIND THAT THERE IS -- OR YOUR HONOR, BECAUSE IT'S TRIED TO YOUR HONOR, ONCE YOUR HONOR FINDS THAT THERE'S A HORIZONTAL CONSPIRACY TO RAISE PRICES AND THEN THE DEFENDANTS MUST MAKE RESTITUTION OF THAT AMOUNT, OR IN CALIFORNIA, THEY HAVE TO DISGORGE THE ENTIRE SALE PRICE, SO ALL YOU HAVE TO DO IS SEND AN ACCOUNTANT OVER THERE AND FIND OUT HOW MUCH.

NOW, IF YOU ARE GOING TO GIVE IT BACK TO THE PLAINTIFFS, THEN YOU HAVE TO HAVE A CLAIMS PROCEDURE. AND

THAT'S DIFFERENT. THAT HAS NOTHING TO DO WITH YOUR HONOR. THAT'S NOTHING TO DO WITH THE DEFENDANTS. IT HAS TO DO WITH A

SPECIAL MASTER, AND PEOPLE COME IN AND THEY MAKE CLAIMS. THAT'S THE WAY YOU DO IT IN ALL THESE CASES, EVEN IF YOU HAVE A DAMAGE VERDICT. YOU HAVE TO HAVE SOME CLAIMS PROCEDURE AT THE END OF THESE. IT'S NOT JUST LIKE --

THE COURT: IF THERE WERE A JURY RIGHT AND IT WAS DAMAGES, THEY WOULD HAVE A SEVENTH AMENDMENT RIGHT TO HAVE THEIR DAMAGE CLAIMS HEARD BY A JURY. BUT GIVEN THAT IT WAS AN EQUITABLE CASE, I SUPPOSE YOU CAN USE A SPECIAL MASTER.

MR. SCARPULLA: BUT, YOUR HONOR, THEY WOULDN'T FIND THAT A SUFFERED $10 AND B SUFFERED $12 AND CLASS MEMBER 165,000 SUFFERED A BUCK AND A HALF. THEY WOULD SAY THE PRICE OF SRAM WAS RAISED BY 10 PERCENT. OKAY? NOW YOU KNOW. AND YOU CAN FIGURE OUT THEY SOLD A MILLION DOLLARS WORTH OF SRAM DURING THE PERIOD, 10 PERCENT OVERCHARGE, HUNDRED THOUSAND DOLLARS GOES BACK.

WHO DOES IT GO TO? IT JUST DOESN'T SIT THERE IN A BANK ACCOUNT, YOU HAVE TO GIVE IT TO SOMEBODY.

THE COURT: BESIDES THE LAWYERS, YOU MEAN?

MR. SCARPULLA: YES, THAT'S TRUE, BUT YOU HAVE TO HAVE A CLAIMS PROCEDURE. THAT'S WHERE -- SEE --

THE COURT: WHAT DO THEY PROVE HOW MUCH THEY SPENT ON THEIR CELL PHONE, OR SOMETHING LIKE THAT?

MR. SCARPULLA: YOU HAVE TO COME IN AND SHOW -- YOU

HAVE TO COME IN AND PROVE IT, AND THEN YOU GET PAID. IF YOU DON'T --

THE COURT: YOU DO HAVE TO COME IN AND SHOW YOUR CELL PHONE.

MR. SCARPULLA: BUT YOU DON'T DO IT HERE.

THE COURT: OKAY.

MR. SCARPULLA: BECAUSE WE KNOW, YOUR HONOR, THAT MOTOROLA -- FIRST OF ALL, CELL PHONES AREN'T IN OUR CASE, BUT PUT THAT ASIDE. PC'S, YOU COME IN WITH A PC, AND WE KNOW HOW MUCH SRAM IS IN A PC. AND BASICALLY IT'S SAMSUNG AND CYPRESS.

THE COURT: WHY DON'T WE TURN TO THE CASE MANAGEMENT CONFERENCE.

I WILL TAKE IT UNDER SUBMISSION.

MR. SCARPULLA: THANK YOU, YOUR HONOR.

MR. RYAN: THERE WAS A SPECIFIC EVIDENTIARY POINT MADE THAT WITH YOUR PERMISSION, I WOULD LIKE TO RESPOND TO.

THE COURT: OKAY.

MR. RYAN: HE SAID EXHIBIT 3 REFERS TO FUTURE DATA.

THE REAL FUTURE DATA, EXHIBIT 27, DEFENDANTS, LOOKS LIKE THIS (INDICATING). THAT'S -- THE BLUE LINE IS PRICE, THE RED LINE IS COST. YOU WILL SEE COST ALL OVER THE PLACE, PRICE STAYED CONSTANT. THAT'S REAL ACTUAL DATA. THOSE ARE REAL ACTUAL PURCHASES AND SALES.

WHAT THEY DID TO GET THOSE NUMBERS WAS THEY USED SOME KIND OF BIZARRE AVERAGING FORMULA. THEY AVERAGED DATA.

NOBODY IS GOING TO SAY REAL DATA IS WORSE THAN AVERAGE DATA. THIS IS THE REAL DATA. WHAT THEY DID WAS THEY AVERAGED IT TO GET TO THAT POINT.

AND THE BOTTOM LINE IN THIS CASE, NO MATTER WHAT KIND OF CASE IT IS, THEY HAVE TO PROVE IMPACT ON A CLASS-WIDE BASIS. THEY HAVEN'T DONE IT AND THEY CAN'T DO IT.

CLASS CERTIFICATION SHOULD BE DENIED ACROSS THE BOARD.

THANK YOU VERY MUCH.

MR. SCARPULLA: CASE MANAGEMENT, YOUR HONOR?

THE COURT: YES, PLEASE.

YOU ARE FROM THE COTCHETT FIRM?

MR. WILLIAMS: FROM THE COTCHETT FIRM, YOUR HONOR.

THE COURT: WE HAVE IT SCHEDULED FOR THE DIRECT PURCHASERS. I GUESS WHAT I WOULD LIKE YOU ALL TO START DEALING WITH IS IF I DO CERTIFY A NATIONWIDE CLASS OF INDIRECT PURCHASERS THAT WE WOULD TRY THE FIRST ELEMENT WITH THE DIRECT PURCHASER CASE.

SO, JUST SO THE DEFENDANTS START THINKING ABOUT THAT BECAUSE THAT IS SET FOR -- I KNOW YOU HAVE MOVED IT, IT IS NOW SET FOR JANUARY OF 2011.

MR. GRIFFIN: JANUARY 10, I BELIEVE, YOUR HONOR. WE SUGGESTED THE 11TH, AND I THINK YOUR HONOR CHANGED IT IN THE ATTACHMENT TO THE 10TH.

THE COURT: JANUARY 10TH OF 2011.

MR. WILLIAMS: THAT IS CORRECT.

THE COURT: WE HAVE A PRETRIAL CONFERENCE OF NOVEMBER 30TH OF 2010, AND A MOTIONS CUTOFF OF SEPTEMBER 9TH OF 2010. SO I GUESS TO THE EXTENT THERE WERE MOTIONS IN THE INDIRECT CASE, IF IT'S CERTIFIED -- EVEN IF IT IS NOT CERTIFIED, I STILL HAVE TO RULE ON THEM ALL.

MR. GRIFFIN: THE SCHEDULE, AS I UNDERSTAND IT, APPLIES TO BOTH DIRECTS AND INDIRECTS.

MR. SCARPULLA: THAT'S WHAT I THOUGHT, TOO, YOUR HONOR.

THE COURT: I SEE. I THOUGHT THAT WAS JUST FOR THE

DIRECTS. YOU ALREADY KNEW THAT. OKAY.

BUT EVEN IF I DON'T CERTIFY, THEN I STILL HAVE TO DEAL WITH ALL THE PRETRIAL RULINGS ON ALL 80 CASES OF INDIRECT PURCHASERS WORTH OF PEOPLE, SO I GUESS THAT WILL HAPPEN EITHER WAY.

MR. GRIFFIN: CORRECT, YOUR HONOR.

THE COURT: THERE'S 46 OPT-OUTS, I THINK YOU SAID?

MR. WILLIAMS: IN THE DIRECT PURCHASER CLASS 46 CLASS MEMBERS HAVE OPTED OUT.

THE COURT: WE BETTER MAKE SURE THAT WE GET -- WE HAVE TO DO THE OPT-OUT, IF WE ARE GOING TO CERTIFY THE CLASS EVEN FOR THE EQUITABLE RELIEF, WE WOULD NEED TO DO THE OPT-OUT PROCEDURE BEFORE THE TRIAL. SO WE NEED TO MOVE THAT ALONG.

THIS SOMEHOW GOT OFF TRACK IN THE CLASS

CERTIFICATION, AT LEAST, FROM THE DIRECT PURCHASER BY ABOUT A YEAR, SO WE ARE GOING TO NEED TO CATCH UP IF WE GO THAT ROUTE.

BUT ANYWAY, WHAT ARE WE GOING TO DO ABOUT THE OPT-OUTS? ARE THEY -- DO THEY HAVE TO FILE THEIR OWN LAWSUIT WITHIN THE STATUTE OF LIMITATIONS? I AM WORRIED ABOUT GOING ALONG WITH THIS CASE AND THEN HAVING TO DEAL WITH CASES OF A BUNCH OF OPT-OUTS THAT I WOULD HAVE TO START OVER WITH.

MR. WILLIAMS: YOUR HONOR, THE OPT-OUTS HAVE EXCLUDED THEMSELVES FROM THE CLASS. THEY ARE FREE TO MAKE THEIR OWN DECISIONS AS TO WHAT THEY CHOOSE TO DO.

THE COURT: BY WHEN DO THEY HAVE TO FILE A LAWSUIT IF THAT'S WHAT THEY WANT TO DO?

MR. WILLIAMS: UNDER THE AMERICAN PIPE CASE, YOUR HONOR, IF MY INTERPRETATION IS RIGHT, THEIR CLOCK BEGAN TO TICK

WHEN THEY OPTED OUT. I DON'T KNOW THAT THAT IS DEFINITIVE BLACK AND WHITE. I THINK DIFFERENT CIRCUITS HAVE LOOKED AT IT DIFFERENTLY. THAT'S HOW I READ THAT DECISION.

THE COURT: HOW LONG OF A STATUTE DO THEY HAVE AND WHEN DID THEY OPT OUT?

MR. WILLIAMS: THERE OPT-OUT DATE WOULD HAVE BEEN BY, I BELIEVE IT IS APRIL. I AM TRYING TO RECALL THE SPECIFIC DATE. APRIL --

THE COURT: THAT SOUNDS RIGHT.

MR. WILLIAMS: -- 6TH, 2009.

THE COURT: DOES THE STATUTE START TO RUN AT ALL

BEFORE YOU SUED OR DO THEY GET A BRAND NEW STATUTE STARTING FROM THE OPT-OUT?

MR. WILLIAMS: I DON'T WANT TO SPEAK FOR THE DEFENDANTS, I ANTICIPATE THEY MIGHT ARGUE THAT THE STATUTE WAS RUNNING BEFORE AND THAT THERE WILL BE INDIVIDUALIZED ISSUES AS TO THOSE CLASS MEMBERS, BUT I BELIEVE AS TO THOSE WHO OPTED OUT, IT BEGINS TO COMMENCE AGAIN ON THE DATE THEY OPTED OUT.

THE COURT: HOW LONG IS IT?

MR. WILLIAMS: THE STATUTE FOR THE ANTITRUST CLAIMS? FOUR YEARS.

THE COURT: FOUR MORE YEARS?

MR. WILLIAMS: WELL, DEPENDING UPON THE ARGUMENTS DEFENDANTS MAKE ABOUT FRAUDULENT CONCEALMENT.

MR. GRIFFIN: YES, YOUR HONOR.

THE COURT: I GUESS I WILL BE RETIRED BY THEN, SO IT WON'T MATTER.

MR. GRIFFIN: WE LIKELY WOULD MAKE DIFFERENT STATUTE

OF LIMITATIONS ARGUMENT DEPENDING ON THE PARTICULAR PLAINTIFF, BUT SUFFICE IT TO SAY THUS FAR THERE HAVE BEEN NO OPT-OUT SUITS TO OUR KNOWLEDGE.

THE COURT: OKAY. AND THEN WHAT ARE YOU TRYING TO DO TO SETTLE THE CASE? I AM SURE WE TALKED ABOUT THIS BEFORE.

MR. WILLIAMS: YOUR HONOR, WE HAVE A COUPLE OF THINGS. JUDGE WEINSTEIN IS APPOINTED SETTLEMENT MASTER IN THIS CASE AND WE HAVE HAD MEETINGS WITH JUDGE WEINSTEIN.

WE HAVE ENTERED INTO SEVERAL SETTLEMENTS WHICH WE ANTICIPATE BRINGING BEFORE YOUR HONOR FOR PRELIMINARY APPROVAL, AT LEAST FILING A NOTICED MOTION WITHIN THE NEXT 45 DAYS FOR APPROVAL OF THOSE HOPING TO HAVE PRELIMINARY APPROVAL BY THE END OF THIS YEAR, AND COMMENCE THE NOTICE PROGRAM AS TO THOSE SETTLEMENTS WORKING TOWARDS FINAL APPROVAL.

WE ARE IN DISCUSSIONS WITH MOST OF THE OTHER DEFENDANTS IN THE ACTION, AND WE ARE HOPEFUL WE CAN BRING MORE SETTLEMENTS TO THE COURT.

THE COURT: WHAT ABOUT THE INDIRECT PURCHASERS?

MR. SCARPULLA: WE ARE THE SAME, YOUR HONOR, EXCEPT THERE ARE, I BELIEVE, FOUR DEFENDANTS LEFT FOR US. THREE OF THEM HAVE TOLD US THEY HAVE ESSENTIALLY NO INTEREST, AND ONE WE ARE CONTINUING -- WELL, THREE OF THEM TOLD US THEY HAVE NO INTEREST UNTIL THEY HEARD -- THAT WENT THROUGH TODAY.

THE COURT: I DON'T UNDERSTAND. YOU HAVE FOUR LEFT, WHAT, TO TALK TO, TO SETTLE WITH?

MR. SCARPULLA: FOUR DEFENDANTS LEFT TO SETTLE WITH.

THE COURT: YOU HAVE SETTLED WITH EVERYONE ELSE?

MR. SCARPULLA: I HAVE, YOUR HONOR.

THE COURT: YOU ONLY HAVE FOUR LEFT?

MR. SCARPULLA: YES, YOUR HONOR.

THE COURT: HOW MANY DO YOU HAVE? I THOUGHT THERE WERE A LOT OF THEM.

MR. WILLIAMS: WE HAD EIGHT IN OUR CASE. I THINK WE

HAVE FIVE LEFT, BUT I THINK THAT MIGHT BE A SMALLER NUMBER IN THE NEAR FUTURE.

THE COURT: OKAY. ARE YOU USING JUDGE WEINSTEIN AS WELL OR ARE YOU DOING IT ON YOUR OWN?

MR. SCARPULLA: RIGHT NOW I AM DOING IT ON MY OWN, YOUR HONOR. WE WENT -- WE HAD ONE MEETING WITH JUDGE WEINSTEIN AND IT DID NOT -- IT DIDN'T RESULT IN ANY SETTLEMENTS.

SO, I MEAN, I HAVE BEEN AROUND LONG ENOUGH, SO, YOU KNOW, I KNOW MOST OF THESE PEOPLE ON THE OTHER SIDE FOR ALMOST 40 YEARS. SO I CALLED THEM AND SAID, YOU GUYS WANT TO TALK OR NOT? IF YOU DO, I'LL WORK WITH YOU. FOUR OF THEM SAID YES AND WE DID IT.

THE COURT: SO DO YOU THINK WE SHOULD GET A SETTLEMENT MASTER OF SOME SORT FOR THE REST OF THEM OR GO BACK TO JUDGE WEINSTEIN?

MR. GRIFFIN: YOUR HONOR, I THINK IT IS FAIR TO SAY WE HAVE HAD -- A NUMBER OF US HAVE HAD MORE THAN ONE SESSION WITH JUDGE WEINSTEIN.

THE COURT: WITH THE DP'S.

MR. GRIFFIN: AND I THINK THE INDIRECTS, MAYBE NOT MR. SCARPULLA.

MR. SCARPULLA: I THOUGHT WE HAD ONE. BUT, WHATEVER. I WILL DO --

MR. GRIFFIN: IT HAS BEEN HELPFUL IN FITS AND STARTS, AND IT MAY BE HELPFUL TO GO BACK AGAIN AFTER THE CLOSE

OF DISCOVERY, BUT AS THEY HAVE INDICATED, THEY ARE REACHING SOME RESOLUTION ON THEIR OWN. AND I THINK FOR NOW, I DON'T SEE THE NEED TO SCHEDULE ANOTHER DATE WITH JUDGE WEINSTEIN IN THE NEAR FUTURE, BUT PERHAPS TOWARD THE CLOSE OF DISCOVERY.

THE COURT: CAN I JUST LEAVE YOU ALL TO YOUR OWN DEVICES ON THAT AND TRUST THAT WHEN ANYBODY THINKS IT IS A REASONABLE TIME TO GO BACK TO HIM, THE OTHERS WILL AGREE AND GO BACK TO HIM? OR COME AND TELL ME IF SOMEBODY WON'T?

MR. SCARPULLA: I THINK THAT MAKES SENSE.

MR. WILLIAMS: I THINK THAT'S A GOOD IDEA.

THE COURT: IS THERE ANYTHING ELSE WE NEED TO DEAL WITH AT THIS POINT?

MR. SCARPULLA: I DO WANT TO SAY ONE THING. MY RECOLLECTION IS THAT THERE ARE A NUMBER OF NONSETTLING DEFENDANTS WHO HAVE WITNESSES STILL TO BE DEPOSED. SOME OF THEM ARE IN FOREIGN COUNTRIES. THAT MAKES IT A LITTLE -- IF YOU DON'T SET SCHEDULES EARLY, ESPECIALLY IF YOU HAVE TO GO USE AN EMBASSY, IT TAKES SIX MONTHS TO GET A ROOM IN AN EMBASSY. AND OUR CUT-OFF, MY RECOLLECTION, IS DECEMBER 10TH OF THIS YEAR.

THE COURT: OF '09?

MR. SCARPULLA: '09.

MR. WILLIAMS: FACT DISCOVERY CUTOFF.

MR. SCARPULLA: CURRENTLY THAT'S DISCOVERY CUTOFF, EVEN THOUGH THE TRIAL IS NOT UNTIL JANUARY OF '11.

IF THERE IS THAT KIND OF PROBLEM WITH SCHEDULING DEPOSITIONS, THROUGH NO FAULT OF ANYBODY'S IN THIS COURTROOM, WE MAY HAVE TO RESPECTFULLY ASK YOUR HONOR TO GIVE US A LITTLE BIT MORE TIME TO COMPLETE THAT.

THE COURT: TO COMPLETE THE DISCOVERY?

MR. SCARPULLA: YES. WE MAY HAVE TO ASK YOU TO MOVE THE DECEMBER '09 DATE.

THE COURT: OKAY.

MR. SCARPULLA: I DON'T WANT TO DO THAT NOW.

THE COURT: ALL RIGHT.

MR. SCARPULLA: I JUST WANTED TO LET YOUR HONOR KNOW THAT SO IF IT CAME UP IN THE FUTURE.

THE COURT: I AM GOING TO NEED A HECK OF LOT OF TIME ON THESE DISPOSITIVE MOTIONS. SO DON'T MAKE IT SO THAT THE MOTIONS GETS TOO CLOSE TO THE TRIAL BECAUSE I DON'T KNOW HOW I AM GOING TO RULE ON THESE MOTIONS AS IT IS.

MR. GRIFFIN: THE DEFENDANTS, YOUR HONOR, AGREED TO MOVE THE SCHEDULE SEVERAL TIMES, AND THE CASE HAS BEEN PENDING NOW FOR THREE YEARS, SO WE THINK THAT WHATEVER DISCOVERY SHOULD BE TAKEN SHOULD BE GOING ON NOW AND --

THE COURT: OKAY.

MR. GRIFFIN: -- WE DON'T THINK THERE SHOULD BE ANOTHER EXTENSION.

MR. SCARPULLA: THAT'S FINE WITH ME. THEY CAN BRING EVERYBODY TO SAN FRANCISCO AND I'LL DO IT IN THREE WEEKS.

THE COURT: YOU JUST NEED TO PURSUE IT AS QUICKLY AS

YOU CAN. AND IF YOU ANY PROBLEM, DON'T YOU HAVE JUDGE SMITH AS DISCOVERY MASTER?

MR. WILLIAMS: YES.

THE COURT: GO TO HER AND TELL HER THAT I AM GOING TO NEED -- IT'S HARD TO SCHEDULE A TRIAL OF THIS LENGTH. WE MOVED IT ONCE, BUT I DON'T KNOW HOW MANY TIMES WE CAN MOVE IT. AND I NEED A LOT OF TIME TO DO ALL THESE DISPOSITIVE MOTIONS.

MR. SCARPULLA: I DON'T KNOW, YOUR HONOR, I WOULD BE SURPRISED IF THEY EVEN FILED ANY.

THEY HAVE BEEN LISTENING TO THE TESTIMONY.

THE COURT: OKAY. WELL, MY EXPERIENCE IS THAT I WILL GET THEM. BUT WE'LL SEE.

OKAY. ANYTHING ELSE THEN?

MR. RYAN: NO, YOUR HONOR.

MR. WILLIAMS: NO YOUR HONOR.

THE COURT: OKAY. THANK YOU.

MR. SCARPULLA: THANK YOU VERY MUCH.

MR. RYAN: HAVE A GOOD AFTERNOON.

(PROCEEDINGS CONCLUDED AT 4:05 P.M.)

CERTIFICATE OF REPORTER

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